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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

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No. ~~821~~ 25

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

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No. ~~1070~~ 52

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, *Petitioner,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

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**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR THE PETITIONERS FREDERICK T. ZUBER, ET AL.

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## INDEX


| | Page |
|---|---|
| Opinion Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statute and Regulation Involved | 3 |
| Statement | 4 |
| A. The Genesis of Milk Marketing Regulation | 9 |
| B. The Evolution of the Statutory Authority | 14 |
| C. The Regulatory Scheme Up-to-Date | 20 |
| D. The Proceedings Below | 22 |
| Summary of Argument | 26 |
| Argument | 31 |
| I. The Agricultural Marketing Agreement Act of 1937 Authorizes Inclusion of a Nearby Differential in the Milk Marketing Order for the Massachusetts-Rhode Island Area | 31 |
| A. The Words of the Act Themselves Persuasively Confirm the Secretary's Authorized Use of a Nearby Differential Adjustment | 32 |
| 1. "Uniform prices . . . irrespective of the uses made of such milk by the individual handler" | 33 |
| 2. "Market differentials . . . customarily applied" | 40 |
| B. The Congressional Purposes of the Act as Reflected in Its Historical Background and Legislative History Underscore Congress' Intent To Authorize a Nearby Differential Adjustment in the Massachusetts-Rhode Island Milk Marketing Order | 45 |

Page

C. Consistent Judicial and Administrative Interpretations of the Act Over 30 Years Expressly Approving the Secretary's Continuing Use of a Nearby Differential Adjustment in Milk Marketing Orders Reinforces the Adjustment's Validity and Its Compatibility With Congressional Intent .. 53

II. The Nearby Differential Employed in the Massachusetts-Rhode Island Order Is Supported by Substantial Evidence Demonstrating the Value Enhancing Qualities Contributed by Nearby Producers to the Market .... 61

A. Economic Values Contributed by Nearby Farmers as Reflected in the Nearby Differential Provision Are Irrefutably Demonstrated by the Fact That Orders Containing Such Provisions Have Worked; the Differential Historically Has Been and Currently Is Employed in Federal Orders, in State Regulation and, in Effect, in Free and Unregulated Markets in Large Metropolitan Areas ..... 66

B. Nearby Farmers Have Been and Currently Are More Even Producers, Thereby Serving to Reduce Milk Surplus and to Maintain Price Stability for the Entire Market ..... 68

C. Nearby Producers Are More Reliable and Their Milk Is More Accessible, Assuring a More Steady Milk Supply to Consumers and the Market ..... 74

D. The Nearby Differential Aids in Preserving a Reliable Source of Supply for Small, Inpendent Dealers ..... 75

E. The Nearby Differential Reflects the High Production Costs of Nearby Producers and Recognizes the Substantial Investments Farmers Have Made in Reliance on the Differential ..... 76

F. The Nearby Differential in Other Economic Respects Supports a Sound and Orderly Development of the Milk Market ..... 78

Page

III. If It Is Determined That for Any Reason the Nearby Differential of the Massachusetts-Rhode Island Order Cannot Be Sustained, Remand Is Required ..... 80

A. This Case Was Not Ripe for Summary Judgment Below ..... 80

B. If the Nearby Differential Is Not Sustainable on the Present Record, Settled Principles of Administrative Law Require Remand to the Secretary ..... 85

IV. Regardless of the Outcome of This Case, the Nearby Farmers Who Have Received and Relied Upon the Differential for Over 30 Years Equitably Are Entitled to the Full Escrow Funds ..... 91

Conclusion ..... 94

Appendices

A. Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq.* (relevant portions thereof) ..... 1a

B. Pertinent portions of the Secretary's 1964 Order for the Massachusetts-Rhode Island Milk Market Area (7 C.F.R. §§ 1001.70 and 1001.72) ..... 13a

C. Legislative History ..... 16a

1. Pertinent portions of H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935) ..... 16a

2. Pertinent portions of H.R. Doc. No. 501, 74th Cong., 2d Sess. (June 4, 1936). *Report of the Federal Trade Commission on the Distribution and Sale of Milk and Milk Products, Boston, Baltimore, Cincinnati, St. Louis* ..... 27a

3. Pertinent portions of H.R. Rep. No. 468, 75th Cong., 1st Sess. (1937) ..... 31a

## TABLE OF AUTHORITIES

CASES: Page

*Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944), reh. den. 323 U.S. 645 ..... 31, 42, 85, 86, 87, 88, 89
*A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935) ..... 15, 16, 18, 27, 47
*Allen* v. *City of Louisiana*, 103 U.S. 80 (1881) ..... 89
*Baldwin* v. *Seelig*, 294 U.S. 511 (1935) ..... 46
*Benson* v. *Schofield*, 236 F.2d 719 (D.C. Cir. 1956), cert. den. 352 U.S. 976 (1957) ..... 63
*Blair* v. *Freeman*, 370 F.2d 229 (D.C. Cir. 1966) ..9, 24, 25, 26, 31, 32, 33, 38, 58, 62, 66, 73, 80, 81, 85
*Brannan* v. *Stark*, 342 U.S. 451 (1952) ..... 44
*Calhoun* v. *Freeman*, 316 F.2d 386 (D.C. Cir. 1963) .... 63
*Carter* v. *Carter Coal Co.*, 298 U.S. 238 (1936) ..... 89
*Cranston* v. *Freeman*, 290 F.Supp. 785 (N.D. N.Y.) appeal docketed Nos. 32,793-99, (2d Cir. Oct. 28, 1968) ..... 12, 14, 17, 19, 26, 31, 32, 41, 43, 44, 45, 46, 47, 48, 49, 51, 53, 58, 67, 84
*Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17 (1952), reh. den. 344 U.S. 910 ..... 87
*Fowler* v. *Gage*, 301 F.2d 775 (10th Cir. 1962) ..... 89
*Green Valley Creamery, Inc.* v. *United States*, 108 F.2d 342 (1st Cir. 1939) ..... 7, 21, 26, 31, 41, 44, 53, 56, 57, 58, 81
*Hartley* v. *Commissioner*, 295 U.S. 216 (1935) ..... 59
*Holbrook* v. *Institutional Ins. Co. of America*, 369 F.2d 236 (7th Cir. 1966) ..... 62
*H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588 (1939) ..... 7, 21
*Kennedy* v. *Silas Mason Co.*, 334 U.S. 249 (1948) ..... 84
*Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76 (1962) ..... 79, 93
*Lewes Dairy, Inc.* v. *Freeman*, 401 F.2d 308 (3d Cir. 1968), cert. den. — U.S. — ( ) ..... 59
*Morgan* v. *United States*, 304 U.S. 1 (1938) ..... 82
*Morrison Milling Co.* v. *Freeman*, 365 F.2d 525 (D.C. Cir. 1966), cert. den. 385 U.S. 1024 (1967) ..... 60

Page

*Nebbia* v. *New York*, 291 U.S. 502 (1934) ..... 10
*New York State Guernsey Breeder's Co-op* v. *Wickard*, 141 F.2d 805 (2d Cir. 1944) ..... 76
*Old Mission Portland Cement Co.* v. *Helvering*, 293 U.S. 289 (1934) ..... 59
*Queensboro Farm Products, Inc.* v. *Wickard*, 137 F.2d 969 (2d Cir. 1943) .....52, 60
*Red Lion Broadcasting Co., Inc.* v. *FCC*, — U.S. —, 37 U.S.L.W. 4509 (June 10, 1969) ..... 59
*Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947) .....31, 42, 85
*Securities and Exchange Commission* v. *Talley Industries, Inc.*, 399 F.2d 396 (2d Cir. 1968), cert. den. 393 U.S. 1015 (1969) ..... 45
*Stark* v. *Wickard*, 321 U.S. 288 (Feb. 1944) .....16, 63, 65
*Sunny Hill Farms Dairy Co.* v. *Freeman*, No. S 67 C 19 37
*Udall* v. *Tallman*, 380 U.S. 1 (1965) ..... 59
*Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143 (1946) ..... 45
*United Milk Producers of New Jersey* v. *Benson*, 225 F.2d 527 (D.C. Cir. 1955) ..... 63
*United States* v. *American Trucking Association, Inc.*, 310 U.S. 534 (1940) .....32, 59
*United States* v. *David Buttrick Co.*, 15 F.Supp. 655 (D. Mass. 1936), rev. 91 F.2d 66 (1st Cir. 1937) .. 19
*United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 (1964) ..... 62
*United States* v. *Morgan*, 307 U.S. 183 (1939) ..... 93
*United States* v. *Rock Royal Co-op, Inc.*, 307 U.S. 533 (1939) .....21, 26, 31, 34, 53, 54, 55, 56, 58, 64
*United States* v. *Title Insurance and Trust Co.*, 265 U.S. 472 (1924) ..... 57
*Zuber* v. *Allen*, 402 F.2d 660 (1968) .....1, 26
*Zuber* v. *Allen*, 387 F.2d 862 (D.C. Cir. 1967) ....23, 24, 32

TREATISES, BOOKS AND ARTICLES:

N. Brooks, The Pricing of Milk, 26 GEO. WASH. L. REV. 181 (1958) ..... 10

J. D. BLACK, THE DAIRY INDUSTRY AND THE AAA (Brookings Institute 1935) .....10, 11, 12, 13, 15

Page

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F. F. Linenger, Dairy Products Under the Agricultural Adjustment Act (Brookings Institute 1934) 15

6 Moore, *Federal Practice* 2284 (2d Ed. 1966) ..... 84

Schlesinger, The Coming of the New Deal (1958) 13

Pamphlets and Other Publications:

Boston Milk Market Statistics, Aug. 1937-Dec. 1947 (Pub. Oct. 1947) ..... 65

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Dept. Series 1 Bulletin, *Large Dairy Farms in Mass.*, Mass. Dept. of Agr. ..... 77

The 1964 Elfac Dairy Farm Business Analysis, of Oct. 1968 ..... 76

Federal Milk Order Market Statistics, published annually with monthly supplements .....65, 66

Problems in the Milk Price Regulation, July 1, 1949, filed as Exhibit 5, Docket No. A0205 ..... 65

Producer Delivery Patterns in New England Milk Market, Marketing Research Report No. 672 (July 1964) .....65, 71

Relative Prices to Producers Under Selected Types of Milk Pools, 46-52, 123 Bulletin No. 25, Farm Credit Administration (1938) .....11, 12, 36, 65, 69, 70, 73

Report to the Secretary of Agriculture by the Federal Milk Order Study Committee (1962) .....8, 10, 63, 65

Webster's New International Dictionary (2d Ed.) .... 38

STATUTES: Page

Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. (Supp. III) 2, 5, 6, 19, 52, 1a

§ 2 ..... 33, 74

§ 4 ..... 20, 44, 52, 53

§ 8c(4) ..... 8, 85

§ 8c(5) ..... 3, 48

§ 8c(5)(A) ..... 44, 54

§ 8c(5)(B) ..... 25, 33, 34, 35, 38, 39, 41, 43, 49, 54, 55, 56, 79, 90

§ 8c(5)(B)(a) ..... 33, 37, 73, 79, 90

§ 8c(5)(B)(c) ..... 33

§ 8c(5)(B)(d) ..... 34, 36, 73, 90

§ 8c(5)(G) ..... 79

§ 8c(9) ..... 8, 85

§ 8c(11)(C) ..... 27, 43, 50, 79

§ 8c(13)(B) ..... 63

§ 8c(16) ..... 64

Agricultural Adjustment Act of 1933, May 12, 1933, 48 Stat. 31 ..... 5, 6, 13, 14, 53

1935 Amendments to AAA ..... 18, 47, 51, 52, 59

Capper-Volstead Cooperative Marketing Act, Feb. 18, 1922, 42 Stat. 388, 7 U.S.C. §§ 291 and 292 ..... 12

54 Stat. 17, Act of Jan. 25, 1940 ..... 54

56 Stat. 85, Act of Feb. 10, 1942 ..... 54

61 Stat. 707, 710, Act of Aug. 1, 1947 ..... 54

62 Stat. 1258, Act of July 3, 1948 ..... 54

63 Stat. 282, Act of June 29, 1949 ..... 54

68 Stat. 907, Act of Aug. 28, 1954 ..... 54

Page

75 Stat. 304, 305, Act of Aug. 8, 1961 ..... 54
76 Stat. 632, Act of Sept. 27, 1962 ..... 54
79 Stat. 1270, Act of Nov. 8, 1965 ..... 54
79 Stat. 1187, Act of Nov. 3, 1965 ..... 54
28 U.S.C. 1254(1) ..... 2

LEGISLATIVE DOCUMENTS:

H.R. 5585, 74th Cong., 1st Sess. (1935) ..... 15
H.R. 7088, 74th Cong., 1st Sess. (1935) ..... 15
H.R. 7713, 74th Cong., 1st Sess. (1935) ..... 15
H.R. 8052, 74th Cong., 1st Sess. (1935) .....15, 16
H.R. 8492, 74th Cong., 1st Sess. (1935) ..... 16
H.R. Rep. No. 6, 73d Cong., 1st Sess. 3 (1933) ..... 45
H.R. Rep. No. 468, 75th Cong., 1st Sess. (1937) ..20, 52, 31a
H.R. Rep. No. 952, May 15, 1935 ..... 15
H.R. Rep. No. 1241, 74th Cong., 1st Sess. (1935) 17, 18, 37, 46, 47, 16a
S. 1807, 74th Cong., 1st Sess. (1935) ..... 15
S. Rep. No. 548, 74th Cong., 1st Sess. (1935) .....14, 46
S. Rep. No. 1011, 74th Cong., 1st Sess. (1935) ....17, 18, 37
Constitutionality of the Agricultural Adjustment Act, as amended, by the bill H.R. 8492, S. Committee Print, 74th Cong., 1st Sess. 3 (1935) ..... 18
Hearings before Subcommittee on Dairy and Poultry, House Committee on Agriculture, Dairymen's Class I Base Plan, 89th Cong., 1st Sess. (1965) ... 58
Report of the Federal Trade Commission on Distribution and Sale of Milk and Milk Products, Boston, Baltimore, Cincinnati, St. Louis, H.R. Doc. No. 501, 74th Cong., 2d Sess. (1936) .....11, 13, 19, 44, 51
79 Cong. Rec. 11139, 11140 (1935) .....18, 50
79 Cong. Rec. 9602-04 (1935) ..... 18

Page

REGULATIONS AND ADMINISTRATIVE MATERIALS:

7 C.F.R.

§ 1001.70 ..... 3
§ 1001.72 ..... 3, 6, 58
§ 1001.96 (1968) ..... 88
§ 1002.71 (1966) ..... 58
§ 1015.72 ..... 58
14 Fed. Reg. 7085 (Nov. 23, 1949) ..... 21
16 Fed. Reg. 9250 ..... 21, 36
18 Fed. Reg. 6459 (1953) ..... 64
23 Fed. Reg. 8225, 8227 (Oct. 24, 1958) ..... 21, 74
24 Fed. Reg. 1049 (1959) ..... 41, 58
29 Fed. Reg. 11205 (1964) ..... 6, 8
29 Fed. Reg. 11213 (1964) ..... 22, 42, 89
29 Fed. Reg. 12237 (1964) ..... 22
29 Fed. Reg. 15130 (1964) ..... 36
30 Fed. Reg. 4241 (1965) ..... 58
31 Fed. Reg. 5368 (1966) ..... 90
31 Fed. Reg. 6195 (1966) ..... 90
31 Fed. Reg. 7520 (1966) ..... 22
31 Fed. Reg. 8242 (1966) ..... 22
32 Fed. Reg. 9904 (1967) ..... 68
32 Fed. Reg. 9919 (1967) ..... 8, 41
32 Fed. Reg. 14502 (1967) ..... 5
33 Fed. Reg. 9502 (1968) ..... 66
33 Fed. Reg. 12849 (1968) ..... 66

OTHER: Page

Brief of Zuber, et al. to Court of Appeals (Aug. 15, 1967) ..... 48

Brief of U.S., *Rock Royal Co-op., Inc.* v. *United States* (Oct. Term 1938, No. 771) .....54, 55

Brief of Rock Royal, *Rock Royal Co-op., Inc.* v. *United States* (Oct. Term 1938, No. 771) ..... 54

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1968

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No. 861

FREDERICK T. ZUBER, ET AL., *Petitioners,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

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No. 1076

CLIFFORD M. HARDIN, SECRETARY OF AGRICULTURE, *Petitioner,*

v.

RUSSELL ALLEN, ET AL., *Respondents.*

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**On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF FOR THE PETITIONERS FREDERICK T. ZUBER, ET AL.

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### OPINION BELOW

The opinion of the court of appeals (R. 187 *et seq.*) is reported at 402 F.2d 660. The findings and conclusions of the district court and its order granting summary judgment (R. 120, 121) are not reported.

## JURISDICTION

The judgment of the court of appeals was entered on September 23, 1968 (R. 216). The petition for a writ of certiorari in No. 861 was filed December 20, 1968. The petition for a writ of certiorari in No. 1076 was filed February 20, 1969. Both petitions were granted on April 7, 1969 and the cases were consolidated. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the farm location differential provisions of the federal milk marketing order for the Massachusetts-Rhode Island area are authorized by the Agricultural Marketing Agreement Act of 1937?

2. Whether those farm location differential provisions are supported by substantial evidence?

3. Whether, if the farm location differential provisions are not sustained, the case must be remanded to enable the Secretary of Agriculture either to review or elucidate further the premises of the differential provisions, or to determine if the order without the differential provisions effectuates the policy of the Act or to modify the order so as to effectuate that policy?

4. If the farm location differential provisions are deemed invalid, whether the sums representing the differential which have been and are being escrowed should be paid to those producers who have been receiving and relying on them for over thirty years?

## STATUTE AND REGULATION INVOLVED

Section 8c(5) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 247, as amended, 7 U.S.C. (Supp. III) 608c(5) provides in pertinent part as set forth below. Additional portions of the Agricultural Marketing Agreement Act of 1937 deemed pertinent here are set out at pages 1a-12a of Appendix A to this brief. Pertinent portions of the Massachusetts-Rhode Island 1964 Milk Marketing Order, 7 C.F.R. 1001.70 and 1001.72, are also set out at pages 13a-15a of Appendix B hereto.

"(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That, except in the case of

orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk, which may be adjusted to reflect sales of such milk by any handler or by all handlers in any use classification or classifications, during a representative period of time which need not be limited to one year."

## STATEMENT

Petitioners Zuber, et al. (hereinafter sometimes referred to as the "nearby farmers") are seven dairy farmers who have produced and sold their milk to handlers who have marketed milk in the Massachusetts-

Rhode Island milk marketing area[1] under the federal order involved in this proceeding (R. 346, App. 13a). They and some 2,000 other nearby milk farmers whose milk is also sold under the order operate farms located in close proximity to the principal milk consumption centers. For over four decades, they have consistently received "farm location differential" minimum price adjustments, commonly known as "nearby differential" adjustments, reflecting certain inherent economic values associated with their milk (R. 265-9, 277, 278, 280, 283-5, 287, 627-39).[2] These adjustments were first provided by handlers (*i.e.*, dealers) under free market conditions or under collective bargaining agreements negotiated by farmer cooperatives.[3] They were carefully preserved under the first federal milk licenses issued under the 1933 Agricultural Adjustment Act, 48 Stat. 31, and were consistently maintained for the last 30 years under all federal milk orders for New England issued pursuant to the Agricultural Marketing Agreement Act of 1937 ("the Act"), 50 Stat. 246.

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[1] In 1967, subsequent to the commencement of the proceedings below, the marketing area subject to the federal order was expanded and is now designated as the Massachusetts-Rhode Island-New Hampshire marketing area. 32 Fed. Reg. 14502 (1967).

[2] As it did in the 1937 Boston milk order, the nearby differential provision of the current order represents a 46¢ adjustment in favor of producers with farms located near the market's hub (now most of the milk farmers in Massachusetts, all of those in Rhode Island, and those in portions of Connecticut, Vermont and New Hampshire), and a 23¢ adjustment in favor of producers with farms located at an intermediate distance (now milk farmers in portions of Maine, Massachusetts, New Hampshire and Vermont). See App. B., p. 13a.

[3] J. Cassels, A Study of Fluid Milk Prices 161-62 (Harvard Economic Studies, Vol. LIV, Harvard University Press 1937). (Lib. Ref. HD9282 U4C3 1934).

Respondents, originally five and later increased to 168 Vermont dairy farmers (hereinafter sometimes referred to as the "distant farmers"), operate dairy farms distant from the market's hub but sell to handlers who market under the same federal milk marketing order. They and some 6600 other dairy farmers similarly situated receive a slightly lower minimum blend price as a result of the nearby differential adjustment. This is due to the fact that their distance from the milk market's core and the greater unevenness of their production do not contribute the values to the market as a whole of such factors as reliability, accessibility and seasonality associated with the production of nearby producers. 32 Fed. Reg. 9919 (1967). The present action against the Secretary of Agriculture (Petitioner in No. 1076) by these distant farmers, approximately 30 years after the nearby differential adjustment was first incorporated in the regulatory scheme, challenges the validity of that adjustment as contained in the Secretary's milk marketing order, 7 C.F.R. 1001.72.

The declared purpose of the '37 Act, as well as the 1933 AAA which preceded it, is to establish and maintain orderly marketing, raise producer prices and assure an adequate supply of milk to the consumer (§§ 1 and 2 of the Act). In articulating these purposes, Congress was seeking to restore the market equilibrium preceding the depression. It chose to do so by reinforcing the efforts of the agricultural cooperatives and compelling adherence to these efforts by handlers and distributors. These economic middlemen, by setting one group of farmers against another prior to regulation, had fostered destructive and feverish competition among producers while maintaining their own

profit margins. In the case of milk, the Act authorized the Secretary, in partnership with the producers, to employ two methods of blending the proceeds of the sales of milk and distributing them among producers. These methods were borrowed from cooperatives over the preceding decade and were known as individual handler pools and market-wide pools. In the New England milk markets, market-wide pooling was and is currently the selected means.

Mechanically, the marketing order fixes a "blended" or average minimum price for the entire market, based on sales by all regulated handlers of milk for premium price Class I fluid use and for the lower price Class II use in manufactured products. An equalization pool termed the "producer settlement fund" is operated by an agent of the Secretary (the market administrator) to administer the pool which is funded entirely by the handlers. Handlers make payments to or withdrawals from the pool depending on the extent to which the use value of their milk exceeds or falls short of the blended price. Each producer selling to a handler regulated by the order receives the blended price subject to adjustments for differentials for the grade or quality of the milk delivered, the location at which delivery is made and for "volume, market and production differentials customarily applied by the handlers" subject to the order.[4] Acting pursuant to his authority to make these adjustments, the Secretary has since 1936 consistently incorporated a market differential adjustment based on

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[4] These mechanics are described in *H. P. Hood & Sons, Inc.* v. *United States*, 307 U.S. 588, 593-94 (1939) and in *Green Valley Creamery, Inc.* v. *United States*, 108 F.2d 342 (1st Cir. 1939) [hereinafter cited as *"Hood"* and *"Green Valley"* respectively].

farm location in his marketing orders first for Boston and thereafter for all other New England orders. These orders, except for the Connecticut order, were ultimately merged into a single Massachusetts-Rhode Island order in 1964. 29 Fed. Reg. 11205 (1964); 32 Fed. Reg. 9919 (1967).

The procedures for adoption of the regulatory scheme as well as the scheme itself are unique.[5] The Secretary develops the marketing order only after a full hearing and issues it only if he finds that it, and all of its terms and conditions, will tend to effectuate the Act's policy of establishing and maintaining orderly marketing conditions.[6] That alone, however, does not result in effective regulation. At least two-thirds of the dairy farmers in the marketing area, acting individually or through their cooperatives, must affirmatively approve the order.[7] Thus, even though the Secretary favors regulation, the farmers are free to opt for a free and unregulated market or to reject an order simply because a portion of it is disfavored.

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[5] The agricultural marketing order form of regulation has been described by experts as follows:

> "What has here been created is a truly unique marketing institution, neither quite free nor fully controlled but heavily 'conditioned' by both private and public mechanisms and policies."

REPORT TO THE SECRETARY OF AGRICULTURE BY THE FEDERAL MILK ORDER STUDY COMMITTEE 6, 10 (1962) [hereinafter cited as "MILK ORDER STUDY (1962)"].

[6] Sec. 8c(4).

[7] Sec. 8c(9) of the Act. While the Act allows in addition for approval of an order by a majority in volume of the handlers in the market, this approval, unlike that for farmers' approval, may be waived by the Secretary.

The 1964 Massachusetts-Rhode Island order in fact was approved by a vote of 89.3 percent of the 9,542 distant and nearby producers whose milk was sold to handlers marketing in the area and who were thereby eligible to participate in the referendum.[8] Two-thirds of these farmers were ineligible for the nearby differential.[9]

### A. The Genesis of Milk Marketing Regulation

The legislative development and the regulatory and judicial proceedings leading to review by this Court and the pertinent facts of this litigation are not readily capsulized, for what is involved is "an industry of labyrinthean [sic] complexity"[10] and an integral, historical progression of legislation and regulation extending over a 40-year span. At the heart of the controversy is milk, a bulky and highly perishable commodity. It is consumed in two primary forms—as a fluid for drinking and cooking or as a manufactured product, with the water component largely eliminated, for cheese, butter, ice cream and the like. Because the transportation of fluid milk, 90 percent of which is water, is expensive, a market's fluid milk requirements are most economically obtained from producers adjacent to the metropolitan areas, and milk produced

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[8] 29 Fed. Reg. 12237 (1964).

[9] A similar and overwhelming imprimatur characterized the farmer vote on each of the predecessors of the Massachusetts-Rhode Island order, *e.g.*, Order No. 4 issued February 7, 1936—over 75%; Amended Order No. 4, issued July 30, 1937—over 70%; Amended Boston Order 1941—12,281 for, 61 against; and Amended Boston Order 1951—over 70%.

[10] *Blair* v. *Freeman*, 370 F. 2d 229 at 239 (D.C. Cir. 1966) [hereinafter cited as *"Blair"*].

by more distant farmers in excess of such requirements is processed into manufactured dairy products.[11]

Assuming a free market with a balanced milk supply, the milkshed would logically develop with the area adjacent to the market providing fluid milk supply,[12] an intermediate area to meet fluctuating fluid milk requirements with the balance devoted to manufactured products at close-by plants, and a still more distant area providing milk for manufactured products.[13]

A reasonable spread between the price of milk for fluid use and that for manufactured use, in a market with a balanced supply, assures relative stability in

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[11] MILK ORDER STUDY (1962) *supra* note 5. This Report was prepared at the Secretary's request by 18 prominent milk economists and milk marketing specialists. At p. 24, the Report states:

> "In addition, we are concerned with maintaining as high a degree of efficiency as possible in the organization of the milkshed. This can only be achieved where the fluid milk requirements are obtained from areas immediately adjacent to the market, so that surpluses will be processed into the more concentrated manufactured dairy products in the outlying areas of the milkshed, thus minimizing total transportation costs."

[12] See J. D. BLACK, THE DAIRY INDUSTRY AND THE AAA 217, 219 (Brookings Institute, 1935). At page 219 Professor Black comments:

> "Obviously a price policy which underpays the near-in producer and overpays the outlying producer has the effect of thinning out production near the market and hence of spreading out the milkshed, *when concentration of production near the market is highly to be desired from all points of view.*" (Emphasis added.)

[13] *Id.* at 212-14. As a rule, fluid milksheds require approximately 20 percent suplus production to meet supply-demand flustuation, *Nebbia* v. *New York*, 291 U.S. 502, 517 (1934); N. Brooks, *The Pricing of Milk*, 26 GEO. WASH. L. REV. 181 (1958).

both price and production. However, as the gap between the price of milk for fluid use and the price for manufactured use increases, or a surplus develops in fluid milk supply, the economic leverage available to milk handlers increases. With this leverage, handlers are able cheaply to buy distant milk previously used in manufacturing, absorb transportation costs and sell for fluid use at higher profit margins.[14] As milk prices decrease, the dairy farmer is forced to increase production in order to maintain his income. The expanding surplus which results further depresses milk prices. Since milk is highly perishable, the dairy farmers are largely at the mercy of the handlers.

In order to combat unfair tactics of the handlers and better to regulate supply, farmers by the 1920's had organized cooperatives collectively to negotiate contracts with handlers.[15] The collective economic power to withhold supply from a recalcitrant dealer was often sufficient to bring about an agreement.[16]

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[14] As one leading milk expert has observed:

> ". . . the dealers cannot afford to buy outside milk regularly because of the longer haul involved; but they can buy it long enough to worst the near-in producers who ordinarily have no other outlet."

J. D. BLACK, *supra* note 12, at p. 211.

[15] *Report of the Federal Trade Commission on Distribution and Sale of Milk and Milk Products, Boston, Baltimore, Cincinnati, St. Louis,* H. R. Doc. No. 501, 74th Cong., 2d Sess. 18-28 (1936) [hereinafter cited as "FTC Report, H.R. Doc. 501"]. See also with respect to the Boston market, RELATIVE PRICES TO PRODUCERS UNDER SELECTED TYPES OF MILK POOLS, 46-52, 123 Bulletin No. 25, Farm Credit Administration (1938) [hereinafter cited as "SELECTED TYPES OF MILK POOLS (FCA Pub. 1938)"]. (Lib. Ref. HG2051 U5A574 No. 25).

[16] FTC Report, H.R. Doc. 501, *supra* note 15, at 20.

Congress encouraged this cooperative solution to avoid fluctuation in dairy farmers' income, Capper-Volstead Cooperative Marketing Act, February 18, 1922, 42 Stat. 388, 7 U.S.C. §§ 291 and 292.

Cooperatives devised methods equitably to apportion milk receipts among their producers.[17] A principal method relied on was a blending concept based on classification of milk into two or more major classes (*e.g.*, fluid and manufactured), frequently coupled with base-rating plans and other adjustments in larger, more settled eastern markets, which in part were designed to reward more even nearby producers for the extra economic values which their milk contributed to the markets.[18] In the Boston market, this consistently involved a price premium to the nearby farmers.[19]

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[17] SELECTED TYPES OF MILK POOLS at 46-52 (FCA Pub. 1938) *supra* note 15.

[18] J. D. BLACK, *supra* note 12, at 196-97; SELECTED TYPES OF MILK POOLS (FCA Pub. 1938) at 41-52.

[19] *Cranston* v. *Freeman*, 290 F. Supp. 785 (N.D.N.Y.), appeal docketed Nos. 32,793-99, 2d Cir., October 28, 1968 [hereinafter cited as "Cranston"]. At p. 814, the *Cranston* Court found:

> "Prior to 1933, cooperative associations, as a part of their voluntary methods of pricing milk to producers, gave preferential treatment to nearby producers. This practice also was reflected in the licenses issued under the Agricultural Adjustment Act of 1933. The practice of giving preferential price treatment to producers whose farms were located nearby the market was carried over in some orders issued following the 1935 amendments."

See also p. 800.

The efforts of the cooperative worked well in Boston until approximately 1930.[20] Thereafter, reduction in demand resulting from the depression [21] and a precipitous drop in manufactured milk prices [22] disrupted the market's stability. The handlers were largely responsible; their profit margins generally remained high.[23] A surplus in supply and a widening price spread between fluid and manufactured milk enabled handlers to depress the price of milk for all farmers by setting one group off against the other. Cooperatives, with voluntary memberships, were unable to control the situation. To overcome this crisis, Congress enacted the 1933 AAA to enforce by federal license the terms of the collective bargaining agreements earlier entered into by the cooperatives and by compelling the handlers to abide by those terms.

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[20] FTC Report, H.R. Doc. 501, *supra* note 15, at 16: "The milk-price situation in the Boston market is reported to have been fairly stable up to 1929-30." See also J.D. BLACK, *supra* note 12, at 85: "Until 1930 the milk producer associations had been pretty well satisfied with the progress they were making under the Capper-Volstead Co-Operative Marketing Act."

[21] FTC Report, H.R. Doc. 501, *supra* note 15, at 15.

[22] J. D. BLACK, *supra* note 12, at 72; 110-11; 118; 120-24; 230-32.

[23] See report of speech by Secretary Wallace on January 31, 1934; J. D. BLACK, *supra* note 12, at 129. See also SCHLESINGER, THE COMING OF THE NEW DEAL (1958) stating at p. 76:

> ". . . milk presented a particular area of tension . . . . No commodity was more essential to the nation's health; but in few fields was distribution more chaotic, or the middlemen's cut larger, or the middlemen themselves a more mixed lot . . . ."

**B. The Evolution of the Statutory Authority**

The 1933 AAA vested the Secretary of Agriculture with broad and flexible powers to issue marketing agreements and licenses regulating agricultural commodity markets.[24] Shortly after enactment, the Secretary applied these powers to a number of fluid milk markets in various sections of the country. His objective throughout was to reinforce the previous efforts of cooperatives "by assuring the cooperation of . . . handlers . . . in programs designed to increase the farm price of commodities," [25] tailoring his agreements and licenses to the economic problems of the particular commodity in a given area.

The Secretary's first federal license for Boston under the AAA became effective on November 3, 1933. It regulated milk marketing in the area and included a preferential base for nearby farmers, maintaining the approximate 46¢ differential in excess of transportation and handling cost savings which previously had been paid to these same farmers. While the preferential base was expressed in terms of milk deliveries to plants located near the market's hub (R. 193), ". . . only producers whose farms were nearby the city could deliver to the city plants because of the delivery methods then in existence. . . . The result was that the license in effect provided for a differential to producers with nearby farms." [26]

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[24] Act of May 12, 1933, 48 Stat. 31.

[25] S. Rep. No. 548, 74th Cong., 1st Sess. 3 (1935).

[26] *Cranston*, 290 F.Supp. at 800. See also THE BOSTON MILK LICENSE, A HANDBOOK FOR PRODUCERS, issued August 1, 1934 by the Federal (Boston) Milk Market Administrator.

As a result of substantial enforcement problems,[27] the first Boston license was terminated on February 1, 1934, and a second Boston license became effective on March 16, 1934. Under this license nearby farmers' preferential bases were continued under an authorization to the market administrator to determine the base for each individual farmer.[28] With the problems of license enforcement continuing and litigation rampant, representatives from leading cooperatives and officials of the Department of Agriculture worked independently and together during 1934 and 1935 to fashion new statutory language designed to protect the existing regulatory scheme embodied in the licenses from the widespread judicial attacks then extant. At the same time, members of Congress introduced a succession of bills to continue the licensing program and to preserve the techniques developed originally by the cooperatives before the AAA to achieve some degree of market stability.[29] The decision by this Court on May 27, 1935 in *A. L. A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495, added new urgency to the need for legislative change while strongly suggesting that pending legislative proposals were susceptible to

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[27] See J. D. BLACK, *supra* note 12, at 134-39; F. F. LINENGER, DAIRY PRODUCTS UNDER THE AGRICULTURAL ADJUSTMENT ACT 45-53 (The Brookings Institute, 1934).

[28] *Cranston,* 290 F.Supp. at 800.

[29] See, *e.g.*, S. 1807, H.R. 5585, H.R. 7088, H.R. 7713 and H.R. 8052, 74th Cong., 1st Sess. (1935). H.R. Rep. No. 952, May 15, 1935, of the House Agriculture Committee favorably reporting H.R. 8052 points up, at p. 2, the Committee's determination to reinforce the collective bargaining arrangements which the farm cooperatives earlier had reached with the dealers and distributors in order to raise producer prices.

the same infirmities as the National Industrial Recovery Act which *Schechter* had condemned. Within a matter of a few days, H.R. 8052 was redrafted to incorporate certain of the language which cooperative representatives and Agriculture Department officials had jointly devised[30] and was introduced on June 5, 1935.

Dissatisfaction with the language of this new bill centered on the fear that it did not clearly authorize the Secretary to reflect the variances and differing pricing practices of each market in his regulations. At the prompting of spokesmen for the cooperatives, as well as AAA officials, the House Agriculture Committee added to the bill language which has been carried over in identical form to § 8c(5)(B)(ii) of the Agricultural Marketing Agreement Act of 1937 and is at the focal point of this litigation. That language authorized the Secretary in paying uniform milk prices to producers from an equalization pool created with handler receipts to make adjustments for, among other purposes, "volume, market and production differentials customarily applied by the handlers subject to such order." The language was added on June 14, 1935, and was incorporated into a new bill—H.R. 8492 which was presented to the House on the same date. On the following day, June 15, 1935, the Committee report was issued, after overnight drafting. It purported to ascribe explanations of the generic terms "volume," "production" and "market" differentials

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[30] As noted by Justice Frankfurter in his dissenting opinion in *Stark* v. *Wickard*, 321 U.S. 288, 315 (1944), the legislation was "devised by those who know the needs of the industry and drafted by legislative specialists . . . ."

"customarily applied," [31] although these explanations were merely illustrative.[32] See App. C to this brief, p. 16a.

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[31] H.R. Rep. No. 1241, 74th Cong., 1st Sess. 9-10, App. 24a; see also S. Rep. No. 1011, 74th Cong., 1st Sess. 8 (1935) for virtually identical language.

[32] The court in *Cranston*, following a full evidentiary hearing, confirmed the non-exclusive, illustrative nature of the language of the Committee Report explanations, stating:

"At the trial, witnesses thoroughly familiar with milk marketing both prior to and after the enactment of the 1933 Act testified that these definitions not only excluded differentials in use under the licensing programs but that at least one of the definitions failed to describe any differential then in existence. Richard D. Aplin, who was Assistant Market Administrator under the first federal milk license for the Boston market beginning in 1933 and who is now Market Administrator under the Massachusetts-Rhode Island Order, testified that a volume differential as defined in the reports was paid only by the Dairymen's League Cooperative in New York in the late 1920's and early 1930's, but that a differential for large volume producers was common practice. Mr. Aplin further stated that he knew of no differential that fell within the definition of production differentials as described in the reports although here again he knew of differentials in existence which could be called production differentials, as for example, payments for maintaining evenness of production throughout the year. With respect to market differentials, Mr. Aplin testified that, while the definition given might apply to higher payments made at city plants, such payments, contrary to the reports, were made only in primary markets and not in secondary ones. He himself believed that the farm location differentials, which he stated customarily were paid in New England, were really market differentials.

"Donald Hammerberg, Market Administrator under the Connecticut Order, essentially corroborated Mr. Aplin's testimony, although he was not familiar with the volume differential paid by the Dairymen's League and knew of no differentials which would fit the definition of market differentials described in the reports." *Cranston*, 290 F.Supp. at 800.

The Committee reports also explained the major purposes of the amendments which the bill was to make to the AAA. In addition to overcoming the problems posed by *Schechter* and supplementing the existing Act to provide a more effective regulatory program, two other basic tenets of the Congressional design were to recognize local production and marketing differences previously in force and to follow both the methods employed by cooperatives prior to enactment of the AAA and the licensing programs of that Act.[33]

The Congressional floor debates on the amendments pointed up the Congressional intent to preserve the economic mechanisms which had been developed and used by the cooperative associations prior to any federal regulation.[34] On the Senate floor, specific attention was directed to the manner in which the regulatory scheme would permit nearby dairy farmers to be compensated for their milk so as to reflect their higher production costs and the historically higher prices, over and above transportation costs, which they had received. In response to an inquiry from Senator Copeland of New York, Senator Murphy, the Senate floor manager of the bill, specifically referred to the availability of the "volume, market and production differentials" language of the bill as providing the necessary authority in the Secretary to compensate the nearby farmers, in accordance with past business practices.[35]

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[33] H.R. Rep. No. 1241 at 1, 7, 9; App. 16a, 19a, 23a; S. Rep. No. 1011, at 1, 3, 9; and S. Comm. Print, CONSTITUTIONALITY OF THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED BY THE BILL H.R. 8492, 74th Cong., 1st Sess. 3 (1935).

[34] See, *e.g.*, remarks by Representative Plumley of Vermont, 79 Cong Rec. 9602-04, 74th Cong., 1st Sess. (1935).

[35] The colloquy between Senators Copeland and Murphy, after issuance of the Committee Reports, appears at 79 Cong. Rec. 11139-40 (1935), and is set forth at p. 49 *infra*.

Shortly after passage of the 1935 amendments, the Secretary, in 1936, promulgated Greater Boston Order No. 4 (R. 223). In that order, he retained the base-rating system. To compensate farmers nearby the market who previously had received a preferential base under the license, he provided that those whose farms were located within 40 miles of the State House in Boston and who delivered to plants within the same area would receive a higher price for their base milk than that paid to those distant farmers whose farms were located outside a 40-mile radius but who delivered to a plant within the 40-mile area (R. 231).[36] This was a differential which, in effect, was based solely on the location of a producer's farm since those farmers within a 40-mile radius delivered to city plants.[37] This provision of the 1936 order is the direct predecessor of the farm location differential of the milk marketing order which is at issue here.

This Boston order shortly was suspended as a result of the holding by a district court in Massachusetts that the AAA was unconstitutional.[38] As a consequence of this and other judicial decisions, Congress, on June 3, 1937, reenacted the marketing agreement portions of the amended AAA in a separate statute, the Agricultural Marketing Agreement Act of 1937. Congressional committee reports manifested specific awareness

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[36] Distant producers were entitled to receive an additional 21¢ if they delivered to a plant within the 40-mile radius (R. 232). Where this 21¢ differential was added to the distant producer's blend price, he then would have received approximately 46¢ less than the comparable nearby producer. See FTC Report, H.R. Doc. 501, *supra* note 15, at 183.

[37] *Cranston*, 290 F. Supp. at 800-01 and 814.

[38] *United States* v. *David Buttrick Co.*, 15 F.Supp. 655 (D. Mass. 1936), *rev'd*, 91 F.2d 66 (1st Cir. 1937).

of the New England milk marketing situation and reemphasized the intent to "supplement" cooperative efforts of producers.[39] Neither these reports nor the legislative debates suggested any infirmities in the 1936 Boston order provision for a price differential adjustment to nearby farmers. Congress did, however, take affirmative action to provide in the Act that provisions of past marketing orders were "expressly ratified, legalized, and confirmed."[40]

### C. The Regulatory Scheme Up-to-Date

Following passage of the 1937 Act, on June 3, 1937, the 1936 Boston order was reinstated, effective July 1, 1937. It eliminated base-rating entirely and simply provided a differential adjustment to nearby farmers of 46¢ to those with farms located within 40 miles of the State House in Boston and 23¢ to those with farms located between 40 and 80 miles from the State House (R. 255). Consistent with the earlier base-rating preference to nearby farmers which allotted them a Class I price for their base milk, the adjustment was limited so as not to exceed the same Class I price. Virtually the same differential adjustment provision has remained in effect or been inserted in all subsequent orders regulating the Boston and related milk markets of New England.

The 1937 Boston order, as well as a parallel New York milk order, shortly became the subject of substantial litigation in which both the constitutionality of the 1937 Act and the validity of certain differentials

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[39] See, *e.g.*, H.R. Rep. No. 468, 75th Cong., 1st Sess. 1-2 (1937), App. 31a.

[40] Section 4 of the Act, 50 Stat. 249.

were challenged.[41] Not only was the constitutionality of the Act upheld, but the farm location differential provisions of the New York and Boston orders were explicitly approved by this Court and by the Court of Appeals for the First Circuit respectively,[42] the latter after the presentation of extensive evidence in a hearing before a Master.

Over the ensuing quarter century, the Secretary extended milk marketing regulation to other New England markets; to the Worcester and Springfield, Massachusetts markets in 1949, and to the Southeastern New England market (Rhode Island, Fall River and New Bedford, Massachusetts) in 1958. While in the hearings preceding each of the marketing orders for these areas, the nearby differential was both defended and opposed, it was adopted by the Secretary in the same form as in the Boston order and was overwhelmingly approved by the farmers.[43] In 1964, these various subsidiary orders were consolidated with the Boston order into the single Massachusetts-Rhode Island order. Despite the contentions of representatives of the distant farmers that the nearby differential be reduced or eliminated and the urgings of nearby farmer groups that it be increased, the Secretary rejected both proposals. Noting that higher values beyond those reflecting transportation costs customarily were attached to nearby milk and that historically

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[41] *Hood*, 307 U.S. 588; *United States* v. *Rock Royal Co-op., Inc.*, 307 U.S. 533 (1939) [hereinafter cited as *"Rock Royal"*].

[42] *Rock Royal*, 307 U.S. at 567; *Green Valley*, 108 F. 2d 342.

[43] 14 Fed. Reg. 7085, 7097 (1949); 23 Fed. Reg. 8225 (1958). In 1951, the Secretary also had held hearings on changes in the Boston order and concluded once again that the nearby differential adjustment should be preserved. 16 Fed. Reg. 9250, 9255 (1951).

these had been reflected in his marketing orders, he affirmatively found that the nearby differential should be retained at then present levels (R. 350-1).[44] At the same time, he responded to a request for deferral of the issue, on the grounds that opponents wished to submit a study of the economic and legal aspects of the differential, by suggesting that a study may be made at any time and that review would be available when it was shown that further hearing would be appropriate. Approval by the vast preponderance of farmers in the market followed and the order became effective.

In 1966, amendments were proposed to the order, among them one to delete or reduce the differential.[45] The respondents here did not choose to participate in those proceedings, and the proceedings were still pending at the time litigation below commenced.

### D. The Proceedings Below

On December 27, 1966, just over one month following a decision by the Court of Appeals for the District of Columbia Circuit in *Blair*[46] striking down the farm location differential in the New York-New Jersey milk marketing order, respondents, distant farmers, initiated the present action against the Secretary of Agriculture in the district court below, challenging the validity of the farm location differential in the Massachusetts-Rhode Island milk marketing order (R. 17). That court rejected the Secretary's request to hold the

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[44] 29 Fed. Reg. 11213, 12237 (1964).

[45] 31 Fed. Reg. 7520, 8242 (1966).

[46] 370 F.2d 229 (D.C.Cir. 1966). No petition for certiorari was filed in the *Blair* case.

district court litigation in abeyance or to dismiss it pending an administrative determination in the proceedings before the Secretary (R. 107).

At the outset of the litigation, on January 16, 1967, the distant farmers obtained a preliminary injunction which required escrowing of the nearby differential amounts (R. 62).[47] On the same date, the lower court rejected the requested intervention on the side of the Secretary of various dairy cooperatives whose members were in part nearby farmers (R. 61). As a result of the escrow, the over 2000 nearby farmers in the market ceased receiving the amount of the nearby differential adjustments which had been paid them for over four decades. In view of their direct economic stake in the escrow fund and in the outcome of the litigation, individual dairy farmer members of this nearby group moved on February 24, 1967, to intervene as party defendants on behalf of themselves and the entire nearby class (R. 84). The distant farmers opposed that intervention and, on March 21, 1967, the court entered an order denying it (R. 119). An appeal from the intervention denial was promptly filed and was pending when the district court entered summary judgment against the Secretary.[48]

Also on February 24, 1967, the distant farmers moved for summary judgment (R. 72). Thereafter,

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[47] The escrow was later modified by consent to release to the nearby farmers that portion of the funds which would accrue to nearby farmers under any theory of the case (R. 109).

[48] After filing their appeal, the nearby farmers moved for summary reversal which was denied by the Court of Appeals for the District of Columbia Circuit on May 5, 1967, some two weeks before the district court's hearing on the summary judgment pleading. See *Zuber* v. *Allen*, 387 F.2d 862 (D.C.Cir. 1967).

on March 20, 1967, the Government filed certain selective excerpts from the Secretary's administrative records. On May 24, 1967, by memorandum decision, the district court granted summary judgment against the Secretary, relying wholly on the *Blair* decision of the court of appeals (R. 120).[49]

In aid of their then pending appeal on intervention, the nearby farmers immediately sought to continue the escrow arrangement. While rejecting this request, the court of appeals offered those farmers the option, by mooting their appeal on intervention, to appeal from the merits of the district court's judgment and to seek a preservation of the *status quo* from the district court which had denied that relief to the Secretary, *Zuber* v. *Allen*, 387 F.2d 862 (D.C. Cir. 1967). The nearby farmers elected this option to intervene for the limited purpose of prosecuting an appeal, thereby enabling them to preserve the *status quo* by obtaining from the district court a continuation of the escrowed differential adjustments which otherwise would have been paid out in full to the distant farmers (R. 131, 132, 163, 165). The Secretary subsequently perfected an appeal which was heard and decided together with that of the nearby farmers (R. 165). During the pendency of those appeals, the Secretary issued a recommended decision on the proposals pending before him in the administrative proceedings and, while noting the decision of the district court, concluded that the differential should be continued on the basis of the record, reliance by the nearby farmers over the years on the

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[49] Counsel for the distant farmers submitted a proposed order, which, over vigorous objection by the Government, was entered in unmodified form on June 15, 1967 (R. 121). One such objection by the Government was that the proposed order incorporated no stay or preservation of the *status quo*.

differential in formulating their business decisions and the Secretary's continued belief in the differential's validity.[50]

On September 23, 1968, the court of appeals affirmed the judgment of the district court primarily upon the authority of its opinion in *Blair*. It held that the differential conflicted with the provision of Section 8c(5)(B) of the Act for the payment of uniform prices to producers "irrespective of the uses made of such milk by the individual handler" and that the differential did not constitute one of the adjustments to uniform prices specifically authorized under Section 8c(5)(B)(ii) of the Act. The court noted that its interpretation of the Act conflicted, in language at least, with the interpretation of the First Circuit in *Green Valley*[51] and with a decision of the District Court for the Northern District of New York which, less than two months earlier following an eight day trial in which extensive evidence regarding legislative and administrative history of the Act was heard, had sustained a substantially identical differential in the federal milk marketing order for Connecticut.[52]

To date, approximately seven million dollars of net nearby differential adjustments have been escrowed.[53]

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[50] 32 Fed. Reg. 9918-19 (1967).

[51] 108 F.2d 342.

[52] *Cranston*, 290 F.Supp. 785.

[53] Under the court of appeals' decision which modified the district court judgment, the great bulk of the escrow fund, representing all amounts accrued after the entry of final judgment by the district court on June 15, 1967 would be distributed to the distant farmers; the significant but relatively smaller balance of amounts accruing before final judgment by the district court would be remitted to the nearby farmers (R. 215).

Accretions to the escrow fund occur at a monthly rate of approximately $250,000. By order dated December 2, 1968 the court of appeals stayed its mandate and continued the escrow arrangement until disposition by this Court. (R. 222)

## SUMMARY OF ARGUMENT

The court below, unversed in the "vastly complex regulation of milk marketing" (R. 214, n. 45) and having before it a truncated record compiled in summary proceedings before the district court, has upset an administrative provision of the Secretary of Agriculture which has been consistently applied since 1935 and which has been an integral and vital component of the Massachusetts-Rhode Island milk marketing order matrix since that date. In reaching this result, the lower court not only blithely dismissed compelling precedents of the First Circuit sitting at the hub of the market, in *Green Valley*, and of this Court in *Rock Royal*, both of which authorized the regulatory arrangement condemned below, but also engaged in crucial factual findings which were explicitly contravened in detail by a federal district court decision in *Cranston*, formulated on a full trial record less than two months earlier.

The essence of the conflict here is the interpretation of § 8c(5) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 247, as amended, 7 U.S.C. (Supp. III) 608c(5) and whether or not under that section the Secretary is authorized to provide in the order for a "nearby differential" as one of the "market differentials . . . customarily applied." The legislative and administrative history of the Act confirms the significance of the words' plain meaning. The Act's

progenitors, the 1935 amendments to the AAA and the 1933 AAA itself, did not attempt to revolutionize milk marketing. They sought instead to reinforce past efforts of cooperatives, which had until 1930 been relatively successful in achieving milk market stability, by assuring cooperation from milk handlers or dealers through a unique regulatory partnership between the Secretary and affected dairy farmers. Congress was explicit in its intent that the Secretary "follow" the methods employed by dairy cooperatives in their collective bargaining agreements with handlers for the pooling of market receipts and their equitable apportionment among farmers. H.R. Rep. 1241, 74th Cong., 1st Sess. 9 (1935).

Congress chose apt words to effect its purposes. The 1933 AAA had given the Secretary broad and flexible powers. While the 1935 *Schechter* case necessitated that Congress be more precise, the legislative drafters in early June 1935 purposefully selected terms of breadth in describing the scope of the Secretary's authority to frame milk orders. Section 8c(5) of the Act enables the Secretary to use "one or more" terms set out thereafter, including the employment of two different but permissible pooling mechanisms providing for "uniform" prices payable to farmers "subject in either case . . ." not only to price variations for "volume, market and production" differentials customarily applied but also for "grade and quality" adjustments, another general category, and "a further adjustment, equitably to apportion the total value of the milk purchased . . . among producers . . . ." Congress specifically directed the Secretary in § 8c(11)(C) to frame his orders by "such different terms, applicable to different . . . marketing areas, as the Secretary finds

necessary [so as] to give due recognition to the differences in production and marketing . . . in such areas."

The words of the Act themselves include no hint of any intent to force the Secretary to abandon prior techniques employed in earlier cooperative arrangements and in the Secretary's federal licenses issued under the AAA prior to 1935. Nor do those words suggest an intent to standardize milk order provisions for all markets by reference to specific and limited illustrations of differentials contained in hastily drafted committee reports, for such a reading is contrary to the broad language and the congressional mandate of § 8c(11)(C). Moreover, the words cannot fairly be read, as has the lower court, to exalt "uniform prices . . . irrespective of uses" to such heights that variations for adjustments, thereafter expressly authorized in the very same sentence of the statute as a means equitably to divide receipts among farmers, are interdicted.

Following passage of the 1935 amendments, the Secretary, whose representatives had actively participated in their drafting, chose to continue a nearby differential adjustment in the 1936 Boston order, similar both to that at issue here and to those variations which had been extant in the free market and under earlier federal regulation. With formal knowledge of the differential and particularly mindful of the New England milk market, Congress reenacted the 1935 amendments in 1937, ratifying, legalizing and confirming the provisions of milk orders then in effect.

For over 30 years, the Secretary consistently employed nearby differential adjustments in New Eng-

land orders to effectuate the declared policy of the Act, acting with the knowledge that this Court and the First Circuit Court of Appeals had explicitly sanctioned these adjustments. Moreover, producers who must vote the order in as a substantive precondition to its effectiveness have uniformly done so in overwhelming numbers even though the majority of such producers did not receive the nearby differential. Congress has implicitly approved these administrative and judicial constructions of the Secretary's statutory authority to include such a nearby differential in his New England orders, for it has taken no action to change these constructions while considering amendments to the Act on various occasions.

Even on the basis of the abbreviated and summary record before the district court, the nearby differential is substantiated by evidence showing that it has been effective in achieving the declared statutory objectives of orderly marketing, reasonable farmer prices and adequate supply. It has compensated nearby farmers for their characteristically more even production, which has benefited the entire market by reducing price-depressing surpluses, and for the greater reliability and accessibility of their milk, assuring a steady milk supply for consumers at reasonable prices. The continuation of the differential has also reflected awareness of the higher production costs of nearby farmers and of their substantial farm investments in reliance on it. In short, the maintenance of the differential has, in the Secretary's view and on the basis of the record, supported sound and orderly development in the Massachusetts-Rhode Island milk market.

The district court below peremptorily ruled invalid the key nearby differential provision which in substan-

tially similar form had appeared in federal regulations before 1937 and in virtually identical form in the 1937 Boston milk order and in all successive New England milk orders. It did so by ignoring disputed factual and legal questions of great significance and complexity, including customary trade practices, congressional purpose and intent as set forth in the legislative history, whether the nearby adjustments were arbitrary and discriminatory in their practical application and where the equities lay as between the nearby and distant farmers in the escrow fund, now totalling over $7 million. Rejecting intervention of the nearby farmers whose stake in the case was direct and immediate, and upon a truncated record, the district court hastened to summary judgment, unmindful of the intricacies of the regulation that its judicial fiat might unsettle. This case simply was not ripe for summary judgment.

Moreover, whatever deficiency, if any, may have existed in the Secretary's rationale or acts, Congress has left the labyrinth of milk marketing regulation to the Secretary. Whether or not crucial adjustments and modifications in the milk order by judicial decree will so emasculate the order that it can no longer effectuate the declared policy of the Act must rest with the Secretary in partnership with all affected farmers who, by a two-thirds majority, have approved the order in question including the nearby differential for over 30 years. If the Secretary lacked authority in any way, settled principles of administrative law require that he be afforded an opportunity to remold the situation. Only in this manner will he be able to reflect the economic values contributed to the market by the nearby farmers without severe disruptions and dislocations to the detriment not only of such farmers but to consum-

ers and to the market itself. *Addison* v. *Holly Hills Fruit Products,* 322 U.S. 607 (1944); *Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 794 (1947).

Regardless of the outcome of this case, the nearby farmers who have relied upon the nearby differential for over 30 years equitably are entitled to receive the entire escrow fund. The payment of any portion of the fund to distant producers would simply be a windfall, for they have never planned or relied upon it, have always in the past voted favorably for orders which included it, and have benefited from the higher blend prices and the more stable marketing conditions which are associated primarily with the production of nearby milk.

## ARGUMENT

### I. THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 AUTHORIZES INCLUSION OF A NEARBY DIFFERENTIAL IN THE MILK MARKETING ORDER FOR THE MASSACHUSETTS-RHODE ISLAND AREA.

From 1939 to the present, three different federal courts in four different cases, and this Court in one case, have interpreted the Act with respect to the nearby differential. Three courts, with the benefit of a full evidentiary hearing, found the Act authorized the differential.[54] One court, on summary judgment records in two cases, found the differential was not authorized under the Act.[55] In both these latter two cases, nearby farmers did not participate before the district court in compiling even these limited records, although in the

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[54] *Rock Royal, Green Valley* and *Cranston* cases, *supra* notes 42, 4 and 19.

[55] *Blair* and *Zuber* cases, *supra* note 10, and p. 1 (R. 187).

*Zuber* case now before this Court they strenuously sought to become party defendants before that court.[56]

In all these cases, but particularly in those decided most recently, the courts have placed extensive reliance on the Act's complete and detailed legislative history, whether developed fully in an evidentiary trial as in *Cranston* or in a narrow and confined context through briefs on appeal, as in both *Blair* and *Zuber*. In all these decisions, the courts have derived comfort from their analysis of this legislative history in setting forth their conflicting views of the Act's purposes and of the meaning of the statutory words. While that history is of major importance and must be closely examined, it does not supplant at the outset careful analysis of the language of the Act itself. As this Court has stated:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning." (Footnote omitted.) *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534 at 543 (1940).

**A. The Words of the Act Themselves Persuasively Confirm the Secretary's Authorized Use of a Nearby Differential Adjustment.**

The declared purposes of the Act are "to establish and maintain . . . orderly marketing conditions" (1) in order to assure "as the prices to farmers, parity

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[56] While various grounds have been and will be advanced for distinguishing the opinions of one court from another, a common thread runs through all of them. That thread is the meaning of the Act itself. See *Cranston*, 290 F. Supp. at 790-94; *Zuber*, 402 F.2d at 663; *Blair*, 370 F.2d at 237.

prices . . ." and (2) "as will provide, in the interests of producers and consumers, an orderly flow of the supply . . . [of an agricultural commodity] to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." § 2 of Act, App. 1a-2a. These purposes provide the point of origin in interpreting the complex and detailed statutory scheme.

To implement these purposes in the case of milk, Congress prescribed various mechanisms in Section 8c (5) of the Act. The key words of the particular mechanism which is pertinent here are those of Section 8c (5)(B)(ii) which provide:

> "[1] for the payment to all producers . . . of uniform prices for all milk . . . delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; [2] subject . . . only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order . . . ." (Bracketed numbering added.) (App. 4a-5a)

While these words are at the focal point of this controversy, they cannot be viewed alone but must be read in light of, and together with, the remaining words of the Act in order to assure the Act's internal compatibility in establishing a consistent and clear regulatory pattern and in fulfilling the overall statutory and congressional purposes.

**1. "Uniform prices . . . irrespective of the uses made of such milk by the individual handler."**

The court below, without benefit of an evidentiary record and bound by its earlier decision in *Blair* based upon an even more limited record, has interpreted clause 1 to require a pervasive price uniformity among dairy farmers so that even a specifically authorized

differential adjustment in clause 2 must fall if it may in any way be construed as relating to "sales advantages for fluid use" (R. 207) or reflecting "any reliance whatsoever upon the prohibited factor of fluid use patterns" (R. 192). This construction is not, however, what the words of the Act say.

Under Section 8c(5)(B)(ii), as in Section 8c(5)(B)(i) providing a mechanism for individual handler pools, "uniform prices" are part of the story but not the statutory goal, for the words of the Act do not end there. They specifically provide for adjustments to the uniform prices, whether in a market-wide or an individual handler pool, thereby effecting equitable pricing. Moreover, the suggestion that market-wide uniformity of price without variations related to use is a congressional objective does not comport with the authorization under Section 8c(5)(B)(i) for individual handler pools which, when selected by the Secretary with the approval of the dairy farmers, permits different prices to each group of farmers depending on the handler to which they deliver even though the handlers under the order are necessarily selling in the same market. The overall objectives and the plain words of the Act themselves speak of "parity prices" or "minimum prices." "[U]niform prices" are but a mechanical first step to this end.

This Court's decision in *Rock Royal* recognized that it is not strict price equality which the statute seeks but rather equitable pricing among dairy farmers. In *Rock Royal*, the constitutionality of the Act was challenged on the grounds, among others, that the pooling arrangements would constitute a deprivation of property and if carried to their logical conclusion "would

mean that the wages of the employed would be shared with the unemployed; the highly paid, with the underpaid, and the receipts of the able, the fortunate and the diligent, with the incompetent, the unlucky and the drone." 307 U.S. at 572. This Court responded by stating that: "No such exaggerated equalization of wealth and opportunity is proposed," 307 U.S. at 572, having just previously noted in its opinion that the Act specifically provided for "differentials for quality, location or other usual market variations." 307 U.S. at 571. In short, what the Act required, in this Court's view, was "a fair division among producers of the fluid milk market," 307 U.S. at 550, not an equal division.

The lower court, while recognizing the Act's provision for adjustments, was so imbued with price uniformity as a statutory goal that it construed the statute to interdict any adjustment which reflected, in its own words, "any reliance whatsoever upon the prohibited factor of fluid use patterns." (R. 192). Presumably, the court was reading the language "uniform prices . . . , irrespective of the uses made of such milk by the individual handler" as the basis for such an interdiction. Such a reading, however, not only overlooks, but reads out of the Act the remaining statutory provisions. Section 8c(5)(B)(ii) specifically permits adjustments for "(b) the grade or quality of the milk delivered." Both grade and quality are closely related to sales advantage for fluid use, for manufactured milk products, in general, require no special grade or quality features. Today, many federal milk orders include a quality differential adjustment for butterfat (a "butterfat differential") which is paid solely because the butterfat

enhances the value of milk for fluid use.[57] Like "market differentials," "grade and quality" adjustments are specifically authorized. Clearly neither is prohibited because they are related in some fashion to fluid use.

Section 8c(5)(B)(ii)(d) of the Act has been construed to authorize base-rating[58] as an adjustment to "uniform prices." To the extent the nearby differential relates to fluid milk use, so too does base-rating which, under the Boston milk license issued pursuant to the AAA of 1933, was the means used, in conjunction with a nearby price variation, to give effect to the historically higher prices and inherent economic values attaching to the milk of nearby producers (R. 193). Even certain of the location differentials under Section 8c(5)(B)(ii)(c) which are presently relied upon by the Secretary in milk orders throughout the country reflect a reliance upon fluid milk patterns and not a recognition of "differences in transportation costs only" which the lower court found to be the sole authorized purpose of such differentials (R. 209).[59] More-

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[57] In the Greater Boston order in 1951, for example, the Secretary adopted a butterfat differential stating:

> "According to the findings of the study, the proposed factor would reflect more accurately the actual value of butterfat in terms of its use as fluid cream. Since the butterfat differential has been related historically to its fluid cream value, the proposed factor should be adopted." 16 Fed. Reg. 9255 (1951).

[58] For a detailed explanation of base-rating, see SELECTED TYPES OF MILK POOLS 63-67 (FCA Pub. 1938) *supra* note 15.

[59] The Secretary's use of location differentials are not so narrowly confined and have sometimes been premised on the need to assure an adequate supply of fluid milk for plants in the marketing area and to provide for better fluid milk price alignments between orders. See, *e.g.* 29 Fed Reg. 15130 (1964) regarding a location

over, at least one form of "production" differential authorized under Section 8c(5)(B)(ii)(a) of the Act as an adjustment to "uniform prices" involves direct consideration of the potential use of the milk of specific producers. Thus, the explanation in the Committe Reports in respect of the 1935 Act, on which the lower court so heavily relies (R. 208-9), characterize a production differential as one paid to a producer "to compensate him for keeping his farm and milk qualified for a city [fluid] market even though his milk may actually be going into manufactured use."[60] It would be anomalous indeed if, as the lower court's view would require, an adjustment were barred to a nearby farmer because of the potential and actual fluid use of his milk but permitted to a more distant farmer because his milk was being kept qualified for potential or actual fluid use. The result would be to reward the distant farmer for keeping his milk available for fluid use regardless of actual use while penalizing the nearby farmer with a lower price for the same milk availability and a greater likelihood of actual fluid use.[61]

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differential in the St. Louis milk marketing order which currently is under handler attack in litigation pending before the United States District Court for the Eastern District of Missouri. *Sunny Hill Farms Dairy Co.* v. *Freeman*, No. S 67 C 19.

[60] H.R. Rep. No. 1241 at 10, App. 24a; S. Rep. No. 1011, 74th Cong., 1st Sess. 10 (1935).

[61] The lower court's opinion explicitly rejected "availability" as a justification for an authorized adjustment from uniform prices. Thus, the court stated (R. 195):

> "The reason for this 'economic position' [that of the nearby producers] was, as the Secretary recognized, 'availability *for Class I* use.' We are unable to distinguish this factor from the consideration of historical fluid use patterns condemned in *Blair*."

While not entirely clear from its opinion, the lower court in both this case below and in *Blair* appears to derive its interpretation of strict price uniformity from the clause in Section 8c(5)(B)(ii) which calls for "uniform prices" for milk *"irrespective of the uses made of such milk by the individual handler. . . ."* The significance of this clause in the statutory scheme is evident from the fact that no comparable language appears in Section 8c(5)(B)(i) describing the individual handler pool. Both that pool and the market-wide pool work in the same manner. For both, "uniform prices" is only a starting point and, "in either case" the same statutory differential adjustments are authorized. Accordingly, if the court below has premised its rationale on the "irrespective of use" language of the Act, the absence of that verbiage with respect to an individual handler pool would dictate that no such strict price uniformity is required for producers covered under such a pool. Neither the Act itself nor its legislative history suggests any such distinction between a handler pool and a market-wide pool. Clearly, the Act does not contemplate that the authorized differentials from "uniform prices" in the case of one pool are different than for the other since the differential language applies to both.

"Irrespective" is not a word, as the lower court would have it, of prohibition (R. 191, 192, 203) or condemnation (R. 191, 192).[62] In fact, the phrase has largely a descriptive purpose, in serving to point up the contrast between the Secretary's authority to institute an individual handler pool under Section 8c(5)

[62] WEBSTER'S NEW INTERNATIONAL DICTIONARY (2nd Ed. 1951) defines "irrespective of" as follows: "Regardless of; without respect or regard to; independent of; as *irrespective of* differences."

(B)(i) and his authority for a market-wide pool under Section 8c(5)(B)(ii). In light of the differing shares of the fluid use market obtained by the various handlers in a market, an individual handler pool operates to provide each group of producers supplying an individual handler with a uniform minimum price, subject to authorized adjustments, different from other groups of producers supplying other handlers. A market-wide pool, on the other hand, operates to provide a uniform minimum price, subject to authorized adjustments, to all producers "irrespective of" the use classes in which the individual handler's milk is sold. To illustrate the mechanics of the market-wide pool, on a particular day one dairy farmer may deliver all his milk to a handler using 80 percent of all the milk he receives for fluid use. His neighbor may deliver to a handler using only 20 percent of all the milk he receives for fluid use. Both farmers may be nearby or distant producers, but assuming equal quality and other factors, both farmers would receive the same price despite the fact that a much larger portion of the first farmer's milk would be channeled into the more valuable fluid use. In this sense, the "irrespective of use" clause accurately characterizes the market-wide pool concept.

In addition to stressing this contrast between the individual handler and the market-wide pool, the "irrespective of use" clause serves a second function. It explicitly lodges positive authority in the Secretary, in instituting market-wide pools in regulated markets, to ignore the fluid utilization levels of the individual handlers which in both regulated individual handler pools and in unregulated markets would largely determine the milk prices paid to producers. At the time of the 1935 AAA amendments, this authority was of

a controversial nature. For the first time, it empowered the Secretary to provide for the transfer of the sales proceeds obtained from one handler's sales of milk in the market to the benefit of producers who had never supplied that handler, whose milk may have been sold at an entirely different place and to different customers and who had supplied another handler. In short, the Secretary was enabled to deprive high fluid use handlers of the significant competitive advantage which, before regulation, they had possessed over their lower fluid use competitors in obtaining milk supplies.[63]

**2. "Market differentials . . . customarily applied."**

In keeping with its goals of orderly marketing conditions, parity prices and an orderly flow of supply to market in order to avoid unreasonable fluctuations in supply and price, the Act provides certain adjustments to the uniform prices in either individual handler or market-wide pools. One of these adjustments is for "market . . . differentials . . . customarily applied." In these words lie the true nub of this controversy because adjustments for market differentials customarily applied are explicitly authorized. It is the market differential language on which the Secretary has relied for his authorization of the nearby differential in the

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[63] Before regulation, this competitive advantage of the handlers had been used to set one group of farmers against another in obtaining supplies at cheap prices, thereby reducing the cost of supplies to the handler and enlarging his profit margin. With the drop in demand for fluid milk during the depression, unscrupulous handlers, effectively using this power, fostered an understandable scramble by dairy farmers to meet the resulting cut-throat competition. See pp. 10-12, *supra*.

Massachusetts-Rhode Island order,[64] 32 Fed. Reg. 9919 (July 6, 1967), and his reliance has withstood close judicial scrutiny.[65]

These market differential adjustments are what the words connote. They are adjustments or variations in price associated with the marketing of milk. The Act also requires that, in the context of federal regulation, they must be shown to have been "customarily applied by the handlers subject to such order" before insertion in a regulatory order. Thus, not any and all market price variations are to be countenanced but only those which can be shown to have been customarily paid by handlers. This requirement of customary application is one which must be determined factually at the time the adjustment and the order of which it is a part are

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[64] While the Secretary in administrative proceedings over the years has not always articulated with clarity the specific statutory basis on which he has relied in promulgating the nearby differential, it clearly was done in defense of the differential in *Green Valley* and in the Secretary's recommended decision culminating from the administrative proceedings pending at the outset of the litigation below. 32 Fed. Reg. 9919 (1967). See also the Secretary's Final Decision regarding his first promulgation of the Connecticut milk marketing order and its nearby differential provision in which he referred to the fact that "market differentials of this type have been adopted in the nearby regulated markets." 24 Fed. Reg. 1049, 1063 (1959). *Cranston*, 290 F.Supp. at 795.

[65] *Green Valley*, 108 F.2d 342; see *Cranston*, 290 F.Supp. 785. In *Green Valley*, Judge Magruder concluded as to the same differentials in the predecessor Boston order (at p. 346):

> ". . . the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so they are; but they are also customary market differentials based upon the location of farms nearby the market."

first promulgated. The Secretary has consistently made that determination, *i.e.*, in his 1964 order:

> "The differentials were adopted to reflect in the pricing structure of the order's historical price relationships by location which prevailed in these markets. It was found that customarily somewhat higher values, above those which normally reflected transportation costs, attached to milk produced near the principal consumption centers as compared to the market value of the milk produced in the more distant areas of the milkshed." [66]

The court below, because of its determination that no statutory differential may be "related to sales advantage for fluid use" (R. 207), accorded the "market differential" language of the Act only negligible attention. It concluded that the nearby differential did not fit the explanation of that differential set forth in the hastily drafted Committee Report[67] accompanying the

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[66] 29 Fed. Reg. 11213 (1964). While the lower court's opinion is at best obscure in analysis of the customary application of the nearby differential, the question is essentially one of substantial evidence. If the plaintiffs below had standing to challenge the Secretary's findings as lacking in substantial evidence, and if the lower court had concluded that such substantial evidence was not present or that the findings of the Secretary were not adequate on this point, then, under well established administrative law principles, remand would have been the proper course and not the summary abolishment of the differential. *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944) [hereinafter cited as *"Addison"*]; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947).

[67] In support of this conclusion, the lower court relied solely on *dictum* in its earlier *Blair* decision in which the Government had been the prevailing party in abbreviated summary judgment proceedings before the district court and in which no nearby farmers participated as parties to the litigation. There, too, the lower court had limited its analysis to the language of one narrow segment of the Committee Reports. Moreover, as the *Blair* Court noted, the Government defended the differential there on other statutory grounds than those relied upon by the Secretary here, 370 F.2d at 238, n. 37.

1935 amendments to the AAA and therefore must fall (R. 209). The statutory language, however, is not so precise. It provides for "volume, market, and production differentials customarily applied by the handlers subject to such order." These generic terms are undefined in the Act. Yet, had Congress intended sharply to circumscribe them, as the lower court suggests, it need only have set forth the illustrative but terse Committee Report explanations in the Act itself. That it did not do so could only have been conscious and intentional, as the district court in *Cranston* found after careful analysis.[68]

Other portions of the Act make clear that Congress did not intend to so restrict the authorized differentials.[69] In Section 8c(11)(C), Congress directed the Secretary to reflect in his orders "such different terms, applicable to different . . . marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing . . . in such areas." Use of "volume, market and production differentials customarily applied" was a signal means to this end. It would not have been so if the restrictive

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[68] *Cranston,* 290 F.Supp. at 799.

[69] The statutory language of Sec. 8(c)(5)(B) selected by Congress to express its purpose and intent is broad and generic throughout. The provisions begin by affording the Secretary discretion to include "*one or more* of the . . . terms and conditions" set out thereinafter, and describe two different pooling mechanisms for payment of uniform prices to producers "subject, in either case, . . ." not only to the broad "volume, market and production" differentials, but also to "grade and quality" differentials, another general category, and to "a further adjustment, *equitably to apportion* the total value of the milk purchased . . . among producers . . ." —an unspecific but yet sensible authority to permit the Secretary to do equity. Collectively, the generalized nature of the authorized adjustments enables the Secretary to be both realistic and responsive to the peculiar needs and economic considerations of a particular market in formulating his orders. (Emphasis added.)

explanations in the Committee Reports had been imported into the statute, for these explanations excluded many differentials then in use and in at least one instance were not even meaningful.[70] Indeed, this Court appears to have rejected the lower court's narrow and restrictive interpretation of "market differentials" in the Act.[71] Section 4 of the 1937 Act likewise refutes the lower court's "market differentials" gloss, for it reaffirmed the Secretary's power to maintain any provisions of marketing orders then extant. The nearby differential of the Boston marketing order was such a provision, as Congress was aware at the time of the 1937 enactment.[72]

To recapitulate, under the Act the term "market differentials . . . customarily applied" is undefined. The words of the Act themselves afford no basis for suggesting that it is a term of art capable of precise definition. When read in tandem with other provisions of the Act and against the background of existing prece-

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[70] *Cranston,* 290 F.Supp. at 798-99.

[71] In *Brannan* v. *Stark*, 342 U.S. 451 at 466 (1952), this Court, in rejecting as unauthorized under the Act certain payments to producer associations, referred approvingly to another differential challenged in *Green Valley* but which the First Circuit had found to be a "market differential" under its view of that term. This Court said:

> "Many provisions for payments to cooperatives appearing in other orders have been of a kind specifically authorized by the statute. Thus, the provision of the first Boston Milk Order for a price differential as between cooperative milk and non-cooperative milk was upheld in Green Valley Creamery v. United States, as a 'market differential' authorized by § 8(c)(5)(A)(1)." (Footnote omitted.)

[72] See FTC Report, H.R. Doc. 501 at 183-4. See also n. 86 at p. 51, *infra* for a full discussion of the relevant portion of this Report.

dents, the term "is sufficiently broad and indefinite when used in connection with marketing orders to encompass many types of differential," [73] provided such differentials are "customarily applied" and comport reasonably with the declared policy and the other terms of the Act. Where, as here, the statutory term "market differential . . . customarily applied" is reasonably capable of the interpretation which the Secretary has placed upon it to encompass the nearby differential, that interpretation should be sustained even though a different conclusion might also have been reasonably defended if the issue had arisen otherwise. *Unemployment Compensation Commission of Alaska* v. *Aragon,* 329 U.S. 143, 153 (1946); *Securities and Exchange Commission* v. *Talley Industries, Inc.,* 399 F.2d 396, 403 (2d Cir. 1968), *cert. denied,* 393 U.S. 1015 (1969).

**B. The Congressional Purposes of the Act as Reflected in Its Historical Background and Legislative History Underscore Congress' Intent To Authorize a Nearby Differential Adjustment in the Massachusetts-Rhode Island Milk Marketing Order.**

The formal legislative history of the Agricultural Marketing Agreement Act of 1937 and of its statutory progenitors demonstrates a consistent congressional philosophy to "follow" and "reinforce" the efforts of the dairy cooperative which antedated regulation and to give the Secretary wide discretion in devising regional milk plans to achieve that end.

Federal regulation began with the 1933 AAA and the congressional statement that it was intended by the Act to grant broad and flexible powers to the Secretary for the purpose,[74] as later explained by Congress, of

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[73] *Cranston,* 290 F. Supp. at 797.

[74] H. R. Rep. No. 6, 73 Cong., 1st Sess. 3 (1933).

"reinforcing the operations of cooperative marketing associations" and "to support cooperatives with the power of the Federal Government." [75]

As earlier noted herein (pp. 12-13, *supra*), farmer cooperatives in the dairy industry had engaged in self-regulatory practices for a lengthy and largely successful period until the early 30's. These practices had included collective bargaining agreements with handlers in order to promote price stability and equitably to apportion sales proceeds among producer members. In light of the economic conditions precipitated by the depression and the efforts of handlers to preserve their full profit margins, Congress deemed it essential to strengthen the cooperatives' efforts to assure "the cooperation of processors and distributors [handlers] in the programs." [76] The operations of the cooperatives, in the case of milk, historically had involved preferential treatment in the form of price differentials to nearby farmers to reward them for the extra economic values which their milk contributed to the market.[77] These price differentials were retained by the Secretary in the two Boston milk licenses he issued under the 1933 Act (R. 193). The mechanical form of the differentials varied from the nearby differential involved here, but the substantive effect was the same

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[75] S. Rep. No. 548, 74th Cong., 1st Sess. 3 (1935).

[76] *Id.* at 3 and H.R. Rep. 1241, 74th Cong., 1st Sess. 7 (1935), App. 19a. Congress also had in mind in providing federal regulation that state regulation could not be fully effective in regulating the prices of milk or other commodities because in the larger markets such regulation could not extend over state boundaries to enter the current of interstate commerce. *Cf. Baldwin* v. *Seelig*, 294 U.S. 511 (1935).

[77] *Cranston*, 290 F.Supp. 785 at 814. See p. 5, *supra*.

both as to approximate amount and as to those farmers who were entitled to receive it.[78]

The 1935 amendments to the 1933 AAA are the source for the current statutory language and set forth the milk regulatory program in force today. The legislative history of the 1935 amendments reflects a consistency of congressional purpose. The amendments were described as a "supplement" to the 1933 Act provisions in order to enhance their effectiveness and to meet the problems engendered by the *Schechter* case. They were not intended to change but simply "to implement and spell out in more detail and with greater freedom from ambiguity the powers which were provided for in the original act."[79] Again, it was stressed that "[t]hese terms follow the methods employed" by cooperatives, as well as the provisions of the licenses previously issued by the Secretary.[80]

Thus, the House Committee report emphasized:

> "The operations of cooperative marketing associations will be reinforced by the new sections of the bill dealing with these matters and these provisions will assure the cooperation of processors and dis-

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[78] The lower court's opinion emphasized that one of these early nearby license differentials, as well as the nearby differential in the first Boston milk order, promulgated in 1936, referred solely or in part to delivery location of plants (R. 193, 204). On the strength of this point, the court later suggested that the pre-1937 nearby differentials were of a different type since "none seems to have been based on farm location alone." The court's speculation in this regard is, however, inexorably belied by the record evidence in *Cranston* (at p. 801) and by the *Cranston* court's explicit finding of fact that these early nearby differentials were in effect based on farm location alone (at p. 814).

[79] H. R. Rep. No. 1241, 74th Cong., 1st Sess. 7 (1935), App. 20a.

[80] *Id.* at 9, App. 23a.

> tributors in programs intended to raise farm prices." [81]

Continuation of the methods of the cooperatives was particularly stressed in the Committee Reports' explanatory comments on the differential adjustments of Section 8c(5) of the present Act:

> "Subsection (5) of the proposed section 8c states specifically the terms which may be included in orders relating to milk and its products. These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act and the provisions of licenses issued pursuant to the present Section 8(3) of the Agricultural Adjustment Act." [82]

Against the background of the use by cooperatives before 1933 of price differential adjustments to dairy producers with nearby farms and the retention of those differentials in the two Boston milk licenses, it must be assumed that the draftsmen of the 1935 legislation knew the practices under the federal licenses and the cooperative methods that preceded them and intended that such practices be retained.[83]

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[81] *Id.* at 7, App. 19a.

[82] *Id.* at 9, App. 23a.

[83] *Cranston*, 290 F.Supp. at 799. The *Cranston* court opinion in its discussion on this point at pp. 800-1 refers in detail to and places substantial reliance upon a pamphlet entitled THE BOSTON MILK LICENSE issued August 1, 1934 by the then milk market administrator in Boston. While not a part of the record before the court below, the nearby farmer petitioners urged its pertinency on brief to that court, pointing out that if they had been granted intervention before the district court, they would have introduced it in evidence. Brief of Appellants, Zuber, et al., to the U. S. Court of Appeals in No. 21,141 (August 15, 1967), p. 24, n. 27.

The debates that followed issuance of the Committee Reports on the 1935 amendments further evidence a congressional intent and understanding that nearby differentials based on farm location were contemplated as within the Secretary's powers. In a colloquy on the Senate floor, Senator Copeland of New York closely questioned Senator Murphy, the floor manager of the bill, stating his concern regarding the equalization provisions of the amendments under what is now Section 8c(5)(B). Senator Copeland said:

> "... The provisions of the equalization which we are now discussing provide that a producer who is producing his milk on farms near to cities would receive the same price for his product as a farmer who produces his milk, say, 40 or 50 miles away from the same community."

Senator Murphy replied that Senator Copeland was generally correct.

> "Mr. Murphy. If they were embrased [sic] in the same marketing area, that would be true. Let us keep in mind what the situation is. There is a deficiency of consumer demand. There is a surplus of milk. The price is greatly depressed, and has been for 5 years. The only way in which one can determine how each one of the producers included in the plan provided here shall bear his share of the cost of effecting a higher price is to divide the milk by classification uses."

Senator Copeland, however, was not satisfied with that general answer.

> "Mr. Copeland. I do not think the Senator has quite stated all the conditions. He does not take into consideration the difference in the cost of production. Taxes and values of property near the city are very much higher than in the case of prop-

erty farther away from the city. The transportation differential does not compensate for the difference in cost, as I see it."

Senator Murphy's response then demonstrated that differentials, such as the nearby differential, were both contemplated and intended:

"Mr. Murphy. If the Senator will refer to page 12, line 13, he will see that there is this qualification:

'Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order—'

*They adopt the present practice of business—*

'(2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.' " (Emphasis added.)[84]

This legislative history of the 1935 amendments, contained in the Committee Reports and legislative debates, does not stand alone in confirming the Secretary's authority to provide for a nearby differential as a "market differential . . . customarily applied" in milk orders for the Boston and related New England markets. As earlier noted at p. 43, *supra,* Section 8c(11)(C) of the present statute, enacted as one part of the 1935 amendments, itself reflects a forceful congressional purpose at the time that the Secretary recognize and continue the individual market variances then extant in order to meet the discrete economic circumstances of each market. The nearby differential of the Boston milk licenses was one such variance.

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[84] 79 Cong. Rec. 11140 (1935).

Following the enactment of the 1935 amendments to the AAA, the Secretary promulgated the first Boston milk order, retaining a nearby differential adjustment for those farmers who were located within 40 miles of Boston (R. 223, 231).[85] Contrary to the clearly erroneous factual assumptions of the court below, that this differential was "attributable in large part to transportation and handling advantages" (R. 194-5) and "was never one payable over and above the transportation differential available to distant producers who delivered to a nearby zone" (R. 204), the converse of these assumptions is the fact. The differential in the first Boston order and thereafter has always been payable over and above any transportation differential payable to distant producers delivering in the nearby zone. Moreover, the nearby differential has never been attributable in any part to transportation and handling advantages which have always been compensated independently.[86]

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[85] See p. 19, *supra* and *Cranston*, 290 F.Supp. at 800-01, 814.

[86] See FTC Report, H.R. Doc. 501, 75th Cong., 1st Sess. 183-84 (1936), App. 27a-30a, which sets forth for the 1936 Boston milk order the varying blend prices, including country station and transportation cost differentials, paid to farmers in different zones during a representative period. Nearby farmers during that period received a price of $3.30 or 44.1¢ in excess of the price of $2.859 including handling and transportation costs, received by the distant farmers delivering to city plants. This 44.1¢ adjustment was the nearby differential for that particular representative week. Included in the price to the distant farmers was the country station differential of 21¢ (reflecting a saving in country station handling costs) as well as the saving in transportation costs which was deducted and reflected in the blend prices of other distant farmers not delivering to the city plants within a 40-mile radius of Boston. Hence, the lower court's conclusion quoted in the text that the 1936 nearby differential was never one payable over and above the transportation differential payable to distant producers

Reenactment in the 1937 Act of the identical marketing agreement provisions of the 1935 amendments strongly suggests congressional approval of the marketing orders previously issued and of their provisions which, in the instance of the Boston order, included the nearby differential. As one court has observed in connection specifically with the 1937 reenactment, "much is to be said for a contention that Congress intended to adopt the intervening administrative interpretation." *Queensboro Farm Products Inc.* v. *Wickard,* 137 F.2d 969, 977 (2d Cir. 1943).

Again, as in the legislative history relating to its progenitors, Congress stressed with respect to the 1937 Act that the Secretary's marketing programs had "proven to be valuable supplements to the cooperative efforts of producers, particularly in the case of fruits, vegetables, and milk." [87] Congress did more, however, for, having clearly in mind the desperate situation in the New England milk market as a result of judicial decisions holding the amended AAA unconstitutional,[88] it explicitly provided in section 4 of the 1937 Act, 50 Stat. 249, that the marketing agreements and the provi-

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delivering to a nearby zone is patently erroneous. Likewise, its conclusion that the 1936 nearby differential was attributable to transportation and handling costs is plainly in error, for the 1936 nearby differential was in excess of such costs. These two factual misconceptions comprised a substantial predicate for the lower court's pivotal surmise that "it does not appear that a farm location differential of the kind now under attack ever appeared in a greater Boston license or order before 1937" (R. 204).

[87] H. R. Rep. No. 468, 75th Cong., 1st Sess. 1-2 (1937), App. 31a-32a.

[88] "As a consequence of these decisions, doubt has been cast on the validity of all agreements and orders, and producers of milk, particularly in New England, are now suffering from a seriously demoralized price situation." *Id.* at 2, App. 32a.

sions thereof which had been issued by the Secretary under the 1933 AAA as amended were "ratified, legalized, and confirmed."[89] This was clearly more than merely an implicit approval of the nearby differential provision. That this provision was not merely a congressional attempt to avoid technical abatements, as the court below has opined (R. 204), is established by the complete language of the pertinent House Committee Report. See *Cranston,* 290 F.Supp. at 801-3.

**C. Consistent Judicial and Administrative Interpretations of the Act Over 30 Years Expressly Approving the Secretary's Continuing Use of a Nearby Differential Adjustment in Milk Marketing Orders Reinforces the Adjustment's Validity and Its Compatibility With Congressional Intent.**

Shortly after passage of the 1937 Act, a nearby differential was twice confirmed as lying within the Secretary's statutory authority, by this Court and by the First Circuit Court of Appeals.[90] For 30 years thereafter, Congress has acquiesced in these judicial reaffirmations of the Act's intent to afford the Secretary such discretionary power. On many occasions, amendments to the Act were considered by Congress affecting

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[89] "Nothing in this Act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed." 50 Stat. 249.

By contrast, section 38 of the 1935 amendments, which appears to have dealt with the problem of technical abatement alone, was far more restrictive in its language and did not ratify, legalize or confirm the provisions of existing regulations, 49 Stat. 750.

[90] *Rock Royal,* 307 U.S. 533; *Green Valley,* 108 F.2d 342.

milk order provisions.[91] If Congress had believed that its intent and that of the Act had been frustrated by the courts or by the Secretary, it had ample opportunities to correct the situation. Its silence, while actively considering other changes in the statutory scheme, speaks unequivocally of congressional approval of the consistent judicial and administrative interpretations of the Act regarding the nearby differential.

In *Rock Royal,* this Court expressly affirmed the validity in the New York milk order of a nearby differential based on farm location. This Court held:

> "C. *Nearby Differentials.* Provision is made by the Order for special differentials of 20 cents on milk from certain counties located most favorably to the marketing area. This is to enable handlers to pay the producers at these plants. The five cent difference is absorbed by the handlers. The Act authorizes such an arrangement. § 8c(5)(A)." (Footnotes omitted.) 307 U.S. at 567.

*Rock Royal* specifically argued on brief to this Court (Br. of Rock Royal, Oct. Term 1938, No. 771, p. 55) that such a differential was a preference unauthorized by the statute and prohibited by the language of Section 8c(5)(B)(ii) of the Act "irrespective of the uses made of such milk by the individual handler," precisely the statutory language on which the lower court here bases its concept of congressional prohibition. The government on brief (Br. of U.S., Oct. Term 1938, No.

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[91] *E.g.*, Act of January 25, 1940, 54 Stat. 17 and November 3, 1965, 79 Stat. 1187 and November 8, 1965, 79 Stat. 1270; and in connection with the agricultural marketing order provisions generally; February 10, 1942, 56 Stat. 85; August 1, 1947, 61 Stat. 707, 710; July 3, 1948, 62 Stat. 1258; June 29, 1949, 63 Stat. 282; August 28, 1954, 68 Stat. 907; August 8, 1961, 75 Stat. 304, 305; September 27, 1962, 76 Stat. 632.

771, pp. 60-61) argued "milk of producers in these counties is readily available for use in the fluid market and producers in these counties have always enjoyed an almost exclusively fluid market, not by reason of accidents of competition but by reason of their natural advantages," plainly admitting that the "sales advantage for fluid use" condemned by the ruling below was a factor upon which the differential depended.

The district court in *Rock Royal* found the differential to be "preferential payments made to producers *living* in 18 counties . . . . The producers in those counties received 20 cents per cwt. in addition to the locational differentials, which returned them a higher price for their milk *because they are located nearer New York*" (emphasis added), 26 F.Supp. 534 at 554. The parties took no exception to this district court finding. The preference was based in fact upon location of the farm for the reason discussed by the government brief (Br. of U.S., Oct. Term 1938, No. 771, p. 60) to this Court in *Rock Royal*—a range of mountains made delivery to the plants feasible only for farmers residing in the 18 counties. The validity of the nearby differential was thus posed to this Court as a preference based upon farm location. On that basis, this Court held it to be a differential authorized by the Act.[92]

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[92] The lower court's footnoted attempt to distinguish *Rock Royal* (R. 211, n. 40.1) is superficial and unfounded. To say that *Rock Royal* only involved handlers and therefore a different provision of the statute is a misleading over-simplification. *Rock Royal* itself was a producer's cooperative, the membership of which consisted entirely of producers. It was, as this Court stated, considered as a handler for the purposes of payment for milk under the Act but one of its main complaints was that its members were differentiated against under § 8c(5)(B)(ii) of the Act. This Court held such differentiation to be authorized. Moreover, inasmuch as Subsection (A) provides for the *same* uniform prices subject to the *same*

In *Green Valley*, the First Circuit Court of Appeals, sitting in the hub of the marketing area, approved a substantially identical differential to the one involved here, contained in the 1937 Boston milk marketing order (the predecessor to the Massachusetts-Rhode Island order), as an authorized customary market differential under the Act.[93]

The *Green Valley* court noted that the factors relied upon in support of the differential were "greater accessibility to the market," "greater dependability," "a more uniform level of production throughout the year," "similar differentials" in the Boston market for many years, and the fact that the nearby producers were "also potential dealers." Judge Magruder concluded:

> ". . . the differentials can readily be sustained under Section 8c(5)(B)(ii)(a) of the Act as market differentials which had customarily been applied by handlers subject to the Order. They are called 'location differentials' in the Order, and so

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adjustments as set out in identical language in Subsection (B) applying to producers, this Court's holding that Subsection (A) "authorizes such an arrangement" is virtually conclusive that Subsection (B) authorizes the same arrangement.

The court below also distinguished *Rock Royal* on the grounds that the differential there depended upon plant, and not farm location (R. 211, n. 40.1). However, as noted in the text, both the district court and the parties treated the differential as what it, in fact, was—an adjustment based entirely on the location of producers' farms. In sum, the view of the court below that any differential based on farm location must fall is irreconcilable with the holding of this Court in *Rock Royal* that a differential which in fact was based on farm location was valid.

[93] In 1937, the Secretary had amended the Boston order to eliminate base-rating and preserved the nearby differential, in the form in which it exists today, by providing for a 46¢ adjustment per hundredweight for farmers located in the nearby zone and a 23¢ adjustment for those in an intermediate zone (R. 255).

> they are; but they are also customary market differentials based upon the location of farms nearby the market." 108 F.2d at 346.

The court below struck down the same nearby differential in the successor order, the Massachusetts-Rhode Island order, citing as the basis for holding the differential invalid the very advantages and factors relating to nearby milk that the *Green Valley* court relied upon as justifications for the differential.

Significantly, the *Green Valley* court had a complete evidentiary record relating to the operation of the milk industry in the area and to the legislative history of the Act to aid it in comprehending the intricate complex of milk marketing regulation. The court below had no such evidentiary record before it that would have placed it in an appropriate position properly to challenge the expertise of the Secretary and his Department acquired over 30 years of regulation and as participants in the drafting of the 1935 and the 1937 Acts.[94]

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[94] The court below dismissed the *Green Valley* decision on three grounds, each of which is insubstantial. First, it characterized the *Green Valley* court's approval of the differential as *dictum*, but this hardly squares with the First Circuit's opinion, *cf. United States* v. *Title Insurance and Trust Co.*, 265 U.S. 472, 485-86 (1924), and, in any event, cannot detract from the strength of that court's reasoning. Second, it argued that the defendants in *Green Valley* were solely handlers and not distant producers, but the arguments advanced by those defendants are substantially the same as those which the distant farmers advanced below. Third, it stated that *Green Valley* involved only one of the milk orders later consolidated into the 1964 Massachusetts-Rhode Island order involved here, but that conclusion tends to exalt form over substance. The analysis by the court below in its opinion demonstrates that the Boston order was a crucial segment of the record before it. Moreover, as the government advised the court below on brief, the Boston order was the dominant component of the consolidated 1964 order, accounting for 7,692 or about 75% of the 10,302 farmers covered by the four New England orders merged in 1964.

Following the decisions in *Rock Royal* and *Green Valley,* the Secretary consistently continued to employ the nearby differential in identical form not only in the Boston milk order but, as federal milk regulation was extended, in orders for other closely related New England markets and for markets eleswhere in the country.[95] Thus, as pointed out earlier herein (p. 20), the differential was incorporated in milk orders for each of the three New England markets (Worcester, Springfield and Southeastern New England) when orders for these smaller markets were first promulgated in 1949 and 1958 (R. 331, 336, 340). Notwithstanding this widespread use by the Secretary of the differential, Congress did not interfere even though it clearly knew of the differential's existence and extensive use.[96]

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[95] For example, in the Connecticut order at issue in *Cranston* the differential, 7 C.F.R. 1015.72, has been maintained since the order was first promulgated in 1959. 24 Fed. Reg. 1049 (1959). In the New York-New Jersey market, the differential, 7 C.F.R. 1002.71 (1966), in the form in which it existed at the time ruled invalid in *Blair,* 370 F.2d 229, was incorporated in the federal order in 1957. The differential also has appeared in the Chicago milk marketing order. 30 Fed. Reg. 4241, 4248 (1965).

[96] See, *e.g.,* the following testimony before a congressional subcommittee of John B. Carroll on behalf of United Producer-Distributors of America, Syracuse, New York in *Hearings before Subcommittee on Dairy and Poultry, House Committee on Agriculture, Dairymen's Class I Base Plan,* 89th Cong., 1st Sess. 143 (1965):

> "Congress when it was faced with the problem of milk marketing regulation in 1935 provided for a nearby farm differential. That means that the farmer who is identically similar in terms of theoretical concept to the farmer but differs from him in terms of location where his farm is in terms of the center of the marketing area, it was recognized by Congress at that time that there was a different cost pattern and cost structure for that producer compared to the producer in the further extreme.
>
> "Taxes, for example, might be higher. In addition to that, the producer in the nearby area had had a preferential market

Reenactment without alteration of the 1935 AAA amendments in the 1937 Act, after those amendments had been construed by the Secretary in the 1935-37 period to permit a nearby differential, indicates strongly that Congress impliedly intended adoption of that administrative construction. *Hartley* v. *Commissioner,* 295 U.S. 216, 220 (1935); *Old Mission Portland Cement Co.* v. *Helvering,* 293 U.S. 289, 293-94 (1934). The Secretary's contemporaneous construction of the Act and of its statutory progenitors to authorize the differential, coupled with his consistent and land-standing interpretation over three decades, entitle his interpretations to great weight. *Red Lion Broadcasting Co., Inc.* v. *FCC,* .... U.S. ...., 37 U.S.L.W. 4509, 4513 (June 10, 1969) ("And here this principle is given special force by the equally venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when Congress has refused to alter the administrative construction .... Thirty years of consistent administrative construction left undisturbed by Congress until 1959 ... reinforce the natural conclusion that ... the Act authorized the Commission ..."); see also *United States* v. *American Trucking Association, Inc.,* 310 U.S. 534, 549 (1940); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *Lewes Dairy, Inc.* v. *Freeman,* 401 F.2d 308,

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position. His milk was closer. It was easier to inspect. It was easier to obtain. It was cheaper in some instances. And that has capitalized itself into the cost structure of that producer.

"And if Congress had brought down this so-called paper equal regulation on top of that dissimilar cost structure, it would do an inexorable and unnecessary injustice. And so we provide for the nearby farm differential."

320 (3d Cir. 1968), *cert. denied,* 394 U.S. 929 (1969). The weight to be accorded the Secretary's interpretations of the Act should be even more controlling where, as here, his representatives were largely instrumental in its drafting. *Morrison Milling Co.* v. *Freeman,* 365 F.2d 525, 529 (D.C. Cir. 1966), *cert. denied,* 385 U.S. 1024 (1967).

In connection with the present Act and its milk marketing order provisions, certain guidelines for statutory construction set forth by Judge Jerome Frank, former general counsel of the AAA, are peculiarly apt:

> ". . . Considering the complexities of administration of such an Act, and the plain intention of Congress to give the Secretary wide discretion in devising regional milk plans (and the classifications incident thereto), the courts must be slow to intrude on his exercise of that discretion, if for no other reason than that, being inadequately staffed, they are incompetent to undertake the task of constructing and supervising milk marketing programs. The Supreme Court has admonished us that interpretations of a statute by officers who, under the statute, act in administering it as specialists advised by experts must be accorded considerable weight by the courts. If ever there was a place for that doctrine, it is, as to milk, in connection with the administration of this Act because of its background and legislative history." *Queensboro Farm Products Inc.* v. *Wickard,* 137 F.2d 969, 980 (2d Cir. 1943) (footnotes omitted).

**II. THE NEARBY DIFFERENTIAL EMPLOYED IN THE MASSACHUSETTS-RHODE ISLAND ORDER IS SUPPORTED BY SUBSTANTIAL EVIDENCE DEMONSTRATING THE VALUE ENHANCING QUALITIES CONTRIBUTED BY NEARBY PRODUCERS TO THE MARKET.**

The court below did not in explicit language reach the issue of substantial evidence as supporting the Secretary's use of the nearby differential adjustment in the Massachusetts-Rhode Island order.[97] Its opinion, however, is at best blurred in this regard. It did examine selected portions of such evidence and of the Secretary's findings which relied on the entire "record" but placed the findings and evidence in an artificial and narrow context to support its determination that the differential was unauthorized under the Act because of a relation to sales advantage for fluid use (R. 207). The lower court's analysis of the evidence in the limited confines which it structured cannot mask the two-fold error in its approach and thus in its ultimate conclusion.

First, the "record" to which the court adverted in its opinion as the basis for its extensive examination was but a sampling of the administrative records on which the various pre-1964 New England marketing orders relied.[98] The district court, while aware that

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[97] The distant farmers, in initiating this action before the district court, alleged a lack of substantial evidence in their complaint as one basis for relief (R. 23).

[98] While the court below placed substantial reliance on a supposedly complete "record," no such record was ever before the district court (in which the nearby producers were not parties) or, accordingly, before the court below, which was limited in its review by the record created by the parties before the district court. The regrettable absence of a full record before either of the lower courts not only has led to erroneous factual surmises and assumptions by the court below which were pivotal to its

what was before it were merely excerpts from these administrative records, expressed no interest in analyzing that record and predicated its judgment solely on the *Blair* decision below.[99] In approaching

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ultimate conclusion (see n. 86, p. 51 herein), but has resulted in sharp disputes between the parties, first before the lower court and now before this Court, as to precisely what constitutes the record here. A principal factor in this dispute revolves around certain "summaries" of pertinent administrative hearing records which were prepared solely by respondents and filed with the district court (R. 661-705). Petitioners contend, as set forth in the Appendix, that these "summaries" are not part of the record here, because, as a simple reading of them demonstrates, they are tools of advocacy which were designed by respondents to buttress their arguments and are both highly inaccurate and incomplete. In short, they are supplemental briefs and, like memoranda of points and authorities before the district court, are not part of the record there or on appeal. See Rule 9 of the rules of the district court below. To overcome dispute on this matter, petitioners had sought to furnish this Court with the best evidence of these administrative hearings, *i.e.*, certified copies of the original records, but this approach was rejected by respondents. Petitioners regret that the district court did not have before it this best evidence and recognize that respondents may have felt handicapped as a result. Yet, as the district court docket entries reflect (R. 1-16), respondents never hesitated to seek orders from the district court when to their advantage and could well have done so as to these administrative records rather than to submit summaries of them and affidavits as to a failure to provide these records to the district court. In any event, petitioners, nearby producers, having been refused the right to intervene before the district court, should not be prejudiced by a deficiency for which they could bear no responsibility.

[99] As the court below apparently recognized, the extensive findings of fact and conclusions of law incorporated in the district court's order on summary judgment (R. 121) were entitled to little if any weight on appeal. That order was prepared solely by respondent's counsel after the district court's decision (R. 120) and was mechanically adopted without any change whatsoever, *ex post facto*. Such a district court practice has been sharply and widely condemned. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651 at 656-57 (1964); *Holbrook* v. *Institutional Insurance Co. of America*, 369 F.2d 236 at 242 (7th Cir. 1966).

the "record" in this limited manner, both the district court and the court below ignored the issue of the standing of distant *producers* to attack the nearby differential on grounds that it was unsupported by substantial evidence. Yet, since the terms of the marketing order "are largely matters of administrative discretion as to which there is no justiciable right," *Stark* v. *Wickard,* 321 U.S. 288, 310 (1944), and since producers as such are not regulated under the Act, §8c(13)(B), their standing to seek judicial review appears clearly confined to the single issue of whether a provision under attack is within or without the Secretary's delegated powers.[100]

Indeed, the process adopted by Congress is one of unique partnership which rests responsibility not with the Secretary alone or on the exclusive foundation of the hearing record but places substantial and vital reliance on dairy farmers and their cooperatives. This points up the undesirability of judicial interference. The words of 18 milk specialists describing this process in a 1962 report to the Secretary bear repetition.

> "What has here been created is a truly unique marketing institution, neither quite free nor fully controlled but heavily 'conditioned' by both private and public mechanisms and policies." [101]

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[100] An opportunity for judicial review of producers' complaints regarding a milk order was established in *Stark* v. *Wickard,* in which this Court limited such review "in law enforcement entrusted to . . . [the Secretary] only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers" 321 U.S. at 310. Subsequent decisions have illuminated the narrow limits of this opportunity, *e.g., Benson* v. *Schofield,* 236 F.2d 719 (D.C. Cir. 1956), *cert. denied,* 352 U.S. 976 (1957); *United Milk Producers of New Jersey* v. *Benson,* 225 F.2d 527, 529 (D.C. Cir. 1955); *Calhoun* v. *Freeman,* 316 F.2d 386 (D.C. Cir. 1963).

[101] MILK ORDER STUDY (1962), *supra* n. 5, at p. 6.

Under this scheme, orders may not be formulated by the Secretary unless due notice and opportunity for a hearing is provided at which affected farmers may appear and present evidence. Section 8c(3). Thereafter, orders may not be implemented unless two-thirds of the farmers (generally voting through cooperatives) approve the proposed order by referendum. Section 8c(9). An order must be terminated by the Secretary if 50 percent of the farmers favor its cancellation. Sec. 8c(16). The Secretary thus does not have a free hand. He must listen to the farmers and reflect their collective wishes, and he must do so by keeping close watch on the economic forces at play in the market.[102]

This Court has acknowledged and approved this process of regulation through private and public partnership.[103] In light of this unique regulatory process, this Court has limited judicial review of producers' protests, stating

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[102] For example more than 200 changes were made on 53 separate occasions in the regulatory provisions in the New York milk marketing order during the period from September 1938 through September 1949. 18 Fed. Reg. 6459 (1953).

[103] In *Rock Royal*, the Secretary's order was challenged in part on the basis that the cooperatives had actively participated in proposing, adopting and inducing milk producers and handlers to accept the order using their economic leverage. In sustaining the Secretary's order this Court noted:

> "If the power is in the Congress to put the order in effect, the manner of the demonstration of further approval is likewise under its control. These associations of producers of milk have a vital interest in the establishment of an efficient marketing system. This adequately explains their interest in securing the adoption of an order believed by them to be favorable for this purpose. If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful." 307 U.S. at 559-60.

"So long as the provisions of the Order are within the statutory authority of the Secretary . . . hearings and balloting furnish adequate opportunity for protest." *Stark* v. *Wickard,* 321 U.S. 288 at 307 (1944).

Second, the artificial manner in which the court below undertook its examination of the truncated record before it erroneously led it to the conclusions: (1) that any economic value attributable to the differential which may be interpreted, however tenuously, to reflect "any reliance whatsoever upon the prohibited factor of fluid use patterns" (R. 192) dooms the differential; and (2) that no legitimate factual grounds for the nearby differential in the Massachusetts-Rhode Island order exist, including those which the Secretary himself advanced in 1967 as justification for the differential. A closer and more accurate examination of the "record" evidences the fallacies of these conclusions and demonstrates that the Secretary's long standing use of the differential is supported by substantial evidence of record.[104]

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[104] In aid of effective regulation, the Secretary has authorized and published for public dissemination policy studies and collections of pertinent economic data on a continuing basis. These materials have been available to all parties in milk regulatory proceedings and are, of course, a component of the Secretary's expertise which is involved in all such proceedings. See, *e.g.,* MILK ORDER STUDY (1962), *supra* n. 5; PROBLEMS IN THE MILK PRICE REGULATION, July 1, 1949, filed as Exhibit 5 in the hearings on the Springfield order, Docket No. A0205 (which administrative record was not before the lower court); FEDERAL MILK ORDER MARKET STATISTICS published annually and with monthly supplements; PRODUCER DELIVERY PATTERNS IN NEW ENGLAND MILK MARKET, Marketing Research Report No. 672 (July 1964); BOSTON MILK MARKET STATISTICS, AUGUST 1937—DECEMBER 1947 (published October 1948); SELECTED TYPES OF MILK POOLS (FCA Pub. 1938) (based on New England orders), *supra* n. 15.

**A. Economic Values Contributed by Nearby Farmers as Reflected in the Nearby Differential Provision Are Irrefutably Demonstrated by the Fact That Orders Containing Such Provisions Have Worked; the Differential Historically Has Been and Currently Is Employed in Federal Orders, in State Regulation and, in Effect, in Free and Unregulated Markets in Large Metropolitan Areas.**

The Act's objectives are to establish and maintain orderly marketing conditions and to raise producer prices. § 2. Under the Massachusetts-Rhode Island order and its predecessors, each of which has included a nearby differential, market stability, reasonable price relationships with adjoining regulated and unregulated markets, and blend prices for all farmers that compare favorably with other markets have been achieved.[105] The order has created a stability and price structure that has limited erosion of the nearby source of supply while creating favorable conditions for more distant farmers to enter the market with increasing supplies each year (R. 322-4, 330, 351, 515, 521, 625).

The nearby differential has been customarily utilized in those large metropolitan milk markets where the milksheds have been large enough to include both nearby and more distant producers. Prior to the recent court challenges, between 40 and 50 percent of milk

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[105] See, *e.g.*, FEDERAL MILK ORDER MARKET STATISTICS ANNUAL SUMMARY for 1967 at p. 78. The elimination of the differential in the New York-New Jersey market as a result of *Blair* and the suspension and escrowing of the differential in the Massachusetts-Rhode Island market as a result of the lower courts' rulings, have in part compromised these statutory objectives at a time when national milk production had already begun a sharp and serious decline. Market instability and great uncertainty with respect to future production trends resulted and emergency price expedients became necessary. 33 Fed. Reg. 9502, 12849 (1968).

marketed under federal regulation was sold under orders with a nearby differential.[106]

Historically, the administrative record before this Court demonstrates that as early as 1920 in the Boston market, nearby farmers were paid a price premium in excess of the handling and transportation costs associated with more distant milk (R. 264, 277, 266-9, 280, 283-5, 287, 415-27, 631-3, 635). The continuing payment of this customary price premium or nearby differential in the Boston market until federal regulation was demonstrated in the *Cranston* case.[107] Under the 1933 Act licenses, these differentials were again maintained by provision for higher base ratings to nearby farmers. They were preserved in all federal orders for the Boston market until commencement of these proceedings below.[108]

The nearby differential has also been customarily applied in areas without market-wide pooling. In the Philadelphia market, for example, nearby producers in 1962 enjoyed a substantial price premium under a handler pool arrangement (R. 475, 522-3, 527-8, 622). A

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[106] Until 1966, the orders for Massachusetts-Rhode Island, Connecticut, New York and Chicago included a nearby differential adjustment.

[107] 290 F. Supp. at 814.

[108] While in the 1930's the differential represented a major part (from 20% to 35%) of the total milk price, today the 46¢ adjustment accounts for only about 7% of the blend price under the Massachusetts-Rhode Island order. This has resulted from the Secretary's maintenance of the 46¢ amount of the adjustment since 1937 despite increases in milk prices paid to producers over the years.

similar price premium has been paid to California nearby farmers under free market conditions.[109]

The State of Vermont under state milk regulation also provides a substantial price differential to nearby farmers evincing that state's conclusion that values of nearby supply and the interests of orderly marketing are promoted by the differential.[110]

**B. Nearby Farmers Have Been and Currently Are More Even Producers, Thereby Serving To Reduce Milk Surplus and To Maintain Price Stability for the Entire Market.**

Even production, also termed seasonality, provides substantial benefits to the market as a whole since it reduces surpluses which were a root cause of depressed prices to producers before regulation. While fluid milk demand is relatively steady throughout the year, uncontrolled production is naturally flush in the spring and low in the late fall and winter. The need to afford

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[109] In the hearing record for the Massachusetts-Rhode Island order (1963), at p. 2549, Dr. David Clarke, Professor of Agricultural Economics at the University of California, testified: "[I]t is a matter of fact that in the State of California producers located nearby Los Angeles distributing plants are able to obtain more favorable contracts and thus a higher Class I utilization than producers that are located in the central valley or any other place." This and other portions of the transcript in that record were not certified to the district court below.

[110] The Vermont nearby differential was described by the Secretary in his July 1, 1967 recommended decision for the Massachusetts-Rhode Island order, 32 Fed. Reg. 9904:

> "The price established by the Board [Vermont Milk Control Board] applies to all milk purchased without regard to use. This prince ranges from 40 cents over the Federal Order blend price in the 201-210-mile zone in northern Vermont to 85 cents over such price in the southern part of the State."

adequate plant facilities for manufacturing this seasonal bulge in surplus increases handler costs and must be charged back to all producers, passed on to consumers, or a combination of both. Flush milk production in the spring season depresses prices to all farmers in the regulated Massachusetts-Rhode Island market in two ways. The Secretary's marketing order includes a supply-demand factor that reduces Class I prices when supply is in excess. In addition, the spring surplus increases the amount of milk being manufactured and thus materially reduces the blend prices payable to all producers.

A farmer who regulates his production more evenly throughout the year assists in reducing the handlers' capital costs and supports Class I and blend prices by reducing surplus.[111] His efforts thus benefit not only himself but the *uneven* producers.

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[111] The contributions from more even production to the entire market, and a primary basis for compensating nearby producers for that value, were summarized at page 62 of SELECTED TYPES OF MILK POOLS (FCA Pub. 1938):

"The premise that an even milk supply warrants a higher return each pay period arises from the rather clear set of facts that, if the volume of market receipts as a whole were constant month after month it would be possible to utilize much more fully throughout the year all of the assembly and transportation facilities, and the processing facilities for surplus milk (2). It also would be possible for a smaller number of producers to supply the market throughout the year with an adequate volume of milk, and presumably the annual volume of surplus milk as well as its competitive effect upon fluid-milk prices in seasons of heavy production could be reduced. The marketing system could be much more efficient and the milkshed area smaller. A provision in the pool for differentiating between pool prices on the basis of seasonality because of these facts, presumes, however, that as seasonal variations in market receipts are decreased by a part of the producers

Historically, nearby producers have operated their farms to provide substantially more even production than have the distant farmers in the New England markets. This unchallenged characteristic of nearby farmers' production was true in the 1930's when regulation commenced (R. 257, 265, 270, 274-5, 276). It remained a fact in 1951 (R. 319-20, 329) and in 1963 (R. 640).[112]

Evenness has remained a strong characteristic of nearby New England milk producers. A published study by the Secretary of over 2,500 farms in the New England area for the years 1959-1962 shows nearbys as a class varied a maximum of 22 percentage points

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becoming more even shippers, these savings or these higher values begin to appear and can be secured for producers.

"It has been argued that producers whose milk shipments are relatively irregular in volume should be paid a pool price weighted more heavily by the lower surplus prices in the flush seasons since they are responsible to a large degree for the existence of the seasonal surplus. By the same reasoning, of course, the price to producers whose supply is regular in volume would be weighted more heavily by fluid-milk prices since the variations in their shipments more nearly coincide with the variations in the volume of fluid-milk sales in the market."

[112] A 1938 FCA government study graphically portrayed the results of a thorough and scientific analysis of 2,215 Boston market producers in 1938, representing 14% of the total producers in the market. On the basis of its analysis, that study concluded:

"There was a rather definite and close relationship between evenness and nearness to market among the producers. Of the 2,215 producers in the sample, 405 were in the 6 nearest zones in which any milk was received, and 448 were in the 6 most distant zones. Over 38 percent of the 'nearby' producers were 'even.' Only 10 percent of the distant producers were 'even.' Less than 3 percent of the nearby producers had a ratio of less than 30 percent, whereas almost 20 percent of the producers in the outer zones had a low-to-high ratio of less than 30 percent." SELECTED TYPES OF MILK POOLS (FCA Pub. 1938) at 6-7, see also the graph at p. 25.

between the high and low months of production while distant farmers as a group varied 39 percentage points.[113]

Against the background of his published studies and the evidence presented in administrative proceedings involving first the Boston market and later the Massachusett-Rhode Island market, the Secretary and his aides premised the nearby differential in significant part on the far greater evenness of production associated with the production of nearby farmers than with that of the distant farmers.

The lower court failed to grasp the economic importance of evenness of production and of its contribu-

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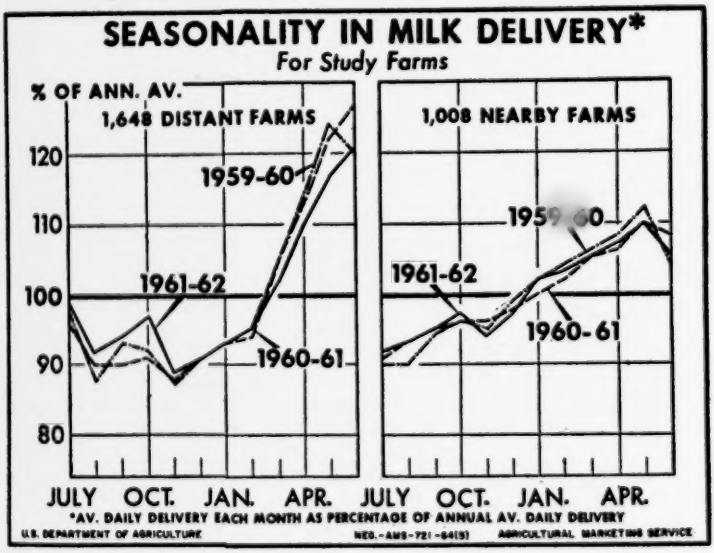
[113] PRODUCER DELIVERY PATTERNS IN THE NEW ENGLAND MILK MARKETS, Marketing Research Report 672 (July 1964), Table 42. Graphically, distant production fluctuated widely while nearbys controlled production within narrow limits:



tion not just to handlers but to the market as a whole, including both the distant and the nearby producers. (p. 68-9, *supra*). Instead, it seemingly applied a measure of what is peculiarly the Secretary's expertise by finding that historically "resort to seasonality" was only "in recognition of the fact that the nearby farmers' evenly produced milk had been sold primarily at Class I prices, *i.e.,* for fluid use" (R. 198).[114] The court below, however, appears to have retreated from this conclusion, for, later in its opinion, it returned to the matter again to re-explore whether evenness of production was proper support for the nearby differential (R. 208). While it again rejected even production as an economic underpinning for the differential, its words reflect some uncertainty:

> "Nor would evenness of production *appear* to support a differential based on farm location. While nearby production may as a general matter be more even, there have been wide individual variations in seasonality throughout the milkshed." (R. 208). (Emphasis added.)

The Secretary, however, has not advanced evenness of production as a basis for the differential because *all* nearby producers were more even on a uniform basis. Rather, his rationale has been that, nearby producers as a group were and are substantially more

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[114] The lower court quoted at some length from the Agriculture Department's 1937 Economic Brief to demonstrate that since not all nearby producers were even, assertions about seasonality were "somewhat undermined" (R. 197). The court neglected, however, to take note of the sentence immediately following that on which it relied. In that added sentence, the Department said: "Only in the nearby zones was there a preponderance of even producers so that, as a group, they showed even deliveries" (R. 274).

even than their distant counterparts.[115] The court below also seems to suggest that because, historically, the evenly produced milk of nearby farmers had been sold primarily at Class I or fluid prices (R. 198), evenness of production reflects too great a reliance on the prohibited factor of historic use values. By its very nature, evenness of production is directly related to the fluid use market.[116] The lower court's surmise that such an economic value can be sanctioned through an adjustment for base-rating under § 8c(5)(B)(d) of the Act is tantamount to the parallel conclusion that it is permitted recognition through an adjustment for a market differential customarily applied under § 8c (5)(B)(a) of the Act. The Secretary, however, is the only expert authority equipped to make a factual determination as to whether or not evenness of production, along with other economic factors associated with nearby milk production, should be reflected in a nearby differential.

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[115] The lower court also alluded to the Secretary's brief discussion of evenness of production in connection with the differential in the New York-New Jersey order struck down in *Blair*. In that decision, as the *Blair* court noted, 370 F.2d at 236, the Secretary, referring to considerable variations in seasonal production in the *New York-New Jersey* market, suggested that base-rating *might be* a more equitable means to compensate more even producers. The fact that the Secretary chose, presumably because of insufficient or different record evidence, not to rely on evenness of production to support the differential in the New York-New Jersey market is not controlling here. Nor does the Secretary's indication that base-rating *might* be preferable in the New York-New Jersey market lead to the conclusion, as the lower court here speculated, that base-rating appears the only sanctioned method by which to stimulate and compensate even production by farmers.

[116] "Manufactured dairy products can be carried over from day to day and for longer periods, so that a uniform supply of milk for such products is not so necessary." SELECTED TYPES OF MILK POOLS (FCA Pub. 1938), *supra* n. 15, at 43.

**C. Nearby Producers Are More Reliable and Their Milk Is More Accessible, Assuring a More Steady Milk Supply to Consumers and the Market.**

The Act's policy looks not only to producers and the milk prices they receive but to such orderly marketing conditions as will provide "in the interests of producers *and consumers, an orderly flow of the supply . . . to market . . .*" (emphasis added). § 2(4). In fulfillment of this objective, the Secretary must consider those statutory tools which will enable him to maintain a reliable and accessible supply of fluid milk to regulated metropolitan markets. He has done so here and has justified the nearby differential, in part, on these factors.

Distant farmers located on the fringe of the northeastern milksheds have mobility to shift their supplies to new markets if economically advantageous. The maintenance of nearby production for the Massachusetts-Rhode Island market thus more readily assures a reliable and accessible milk supply for that market at all times. The administrative record demonstrates that nearby supply is more reliable and accessible when high consumer demand or interruptions in the flow of more distant supply, as by accident or weather, occurs. (R. 552, 567-71, 582-83, 257, 260, 270).[117] The greater

[117] While a gradual increase in the use of bulk tank trucking has somewhat lessened the market's dependence on nearby milk to meet peak demand or emergencies, that dependence has not disappeared. The lower court's "guess" that widespread use of such trucking was present in the 1930's and that, as a result, nearby farmers, "for self protection," insisted on the differential at that time (R. 209, n. 36) is simply wrong on the facts and is totally devoid of support on the record. See 23 Fed. Reg. 8227 (1958) demonstrating that bulk tank trucking is of much more recent vintage. Ex. 7 to the Secretary's 1963 Massachusetts-Rhode Island hearings, not certified to the district court, shows that it was not until 1962 that more than half the farmers in the Boston market shipped in bulk.

reliability of nearby producers stems also from the fact that they are least likely to shift supply to other markets and are thus more responsive in tailoring their production and methods of operation to the requirements of the market. These are benefits to the market as a whole and particularly to the milk consumers.

The court below peremptorily dismissed these economic values of nearby milk production to the market on the principal grounds that they were largely of benefit to handlers and can be compensated only by them (R. 208). This is wrong on two counts. First, the benefits are primarily to the market and consumers, not to handlers. Second, as a result, in a regulated market, those handlers buying from nearby farmers cannot be expected to bear the cost of such benefits through a price premium while competitive handlers, protected by regulation, need only purchase their milk at the class prices required to be paid by all handlers under the order. It is precisely for this reason that the Act authorizes customary market differentials to enable those producers who had received the differentials in a free market to continue obtaining them despite regulation if the Secretary finds them justified.

**D. The Nearby Differential Aids in Preserving a Reliable Source of Supply for Small, Independent Dealers**

The Secretary has also supported the economic viability of the nearby differential in relation to the importance of nearby producers to independent dealers. The requirements of these small business distributors have frequently been too small to utilize tank truck loads of milk (R. 474, 491, 502, 532). Additionally, they normally have had no facilities to manufacture surplus milk. These small businessmen have been

forced to look to other sources including the more even nearby producers for their milk requirements (R. 519-20, 508). The nearby differential price adjustment has enabled a large segment of the nearby farmers to continue in operation despite the higher production costs they experience as a result of their proximity to large metropolitan centers. Abrupt termination of the differential would force many of these nearby producers out of business and, concomitantly, could contribute to the elimination of the small dealers who have relied in large part on nearby milk.

**E. The Nearby Differential Reflects the High Production Costs of Nearby Producers and Recognizes the Substantial Investments Farmers Have Made in Reliance on the Differential**

Production costs which are incurred by nearby farmers are substantially higher than costs incurred by producers located in more distant parts of the marketing area (R. 264, 289-92, 302).[118] While higher costs may not standing alone be sufficient to justify the nearby differential,[119] they are one of the number of economic factors which the Secretary must consider and has considered, on the basis of record evidence, in proposing or rejecting the nearby differential adjustment. That Congress intended this result in adopting the Act is clear from comments of the Senate floor

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[118] THE 1964 ELFAC DAIRY FARM BUSINESS ANALYSIS, of October 1968, published by the Extension Service of the University of Vermont, shows that the costs of nearby farmers in the Massachusetts-Rhode Island market remain substantially greater than those of distant Vermont farmers.

[119] *Cf. New York State Guernsey Breeders' Co-op* v. *Wickard*, 141 F.2d 805, 809-10 (2d Cir. 1944).

leader in the legislative debates. (See p. 49 herein which sets forth those comments.) Moreover, the Secretary's inclusion of the production costs of all the market's producers in the formula basis used in determining the order's Class I price shows that the minimum prices paid to all producers reflect such higher costs.

For more than 40 years, nearby farmers in the Massachusetts-Rhode Island market have received a nearby differential adjustment either in free markets or under federal licenses and orders. Their business decisions and capital investments have been predicated upon it. A price structure which includes the differential has become capitalized into their facility and land values, larger herds and more mechanized operations. These have required larger dollar investments in keeping with the prevailing trend in the dairy industry to economies of scale.[120]

The decision to make these investments by both nearby farmers and their banks was based upon the prevailing pattern of milk prices in orders including the farm location differential. The sudden termination of that price pattern, by judicial fiat, could deprive large numbers of dairy farmers of their substantial investment in dairying facilities, "bring about chaotic conditions in the market" and "so misalign the existing price structure, injure producers, and so seriously

[120] In the Boston market, for example, over 70% of the Massachusetts dairy cows in 1940 were in herds of 30 or less and even as late as 1955 over 50% were in herds of 30 cows or less. In 1960, however, 60% of Massachusetts dairy cows were on farms that had more than 30 cows. DEPARTMENT SERIES 1 BULLETIN, entitled *Large Dairy Farms in Massachusetts,* Massachusetts Department of Agriculture.

disturb long-standing marketing relationships that permanent injury to milk supply for the consumers in the area would result." [121]

**F. The Nearby Differential in Other Economic Respects Supports a Sound and Orderly Development of the Milk Market**

If the nearby differential were eliminated, prices to distant farmers would temporarily increase. More distant producers with increased supplies would then unnecessarily and uneconomically be attracted to the market. Within a short time this overbalance in supply would depress blend prices to the same level which distant producers receive when the differential is in effect. The result would be no net advantage whatsoever to any group of producers currently serving the market (R. 365-68, 377-79, 515-16, 518, 556). This artificial expansion of the milkshed could also create a severe misalignment with other marketing areas. By contrast, the present marketing order with the differential has served to maintain the local sources of milk supply, with only small reductions annually, while enabling increasing numbers of distant producers to participate in the market on the basis of an attractive blend price (R. 322-24, 330, 351, 515, 521, 625).

The ready entry into the market at favorable prices by distant producers is irrefutable evidence that there are no artificial trade barriers in this market. Indeed, the original five plaintiffs below all entered the Massachusets-Rhode Island milk market from other markets (R. 41), presumably, because the price was

[121] Affidavit of Herbert Forest, Director of the Dairy Division, U. S. Department of Agriculture, filed with the district court on January 9, 1967 (R. 52).

better. Moreover, the positive values of nearby production, discussed above, that are reflected in the differential, provide a sound basis for the pricing structure which accomplishes an equitable distribution of market proceeds between groups of producers based on reasonable approximations of contributions made by each group to the entire market. The differential is explicitly authorized by § 8c(5)(B)(ii)(a) of the Act and takes into account "local differences which may exist in production or marketing methods or conditions" [122] as the Secretary by congressional mandate is directed to do. § 8c(11)(C) of the Act. Thus, specifically authorized the nearby differential does not fall within the purview of § 8c(5)(G) in any event.[123] Indeed, were it otherwise, the resulting pricing arrangements without the differential would attract milk from distant areas not attracted in the absence of regulation and thus would tend artificially to limit nearby production. Compare *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76 (1962), in which this Court held that the Secretary could not prohibit unregulated handlers from selling milk in an area by exacting an artificial charge or tax on that milk. No impediment by tax or special charge is imposed by the differential, and milk through handlers supplied by distant producers does in fact freely enter the market.[124]

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[122] S. Rep. No. 1011, 74th Cong., 1st Sess. 9 (1935).

[123] *Cranston*, 290 F.Supp. at 803.

[124] Since the institution of milk orders, most manufactured milk handlers in New England have made at least a minimum amount of fluid milk sales for a minimum portion of the year sufficient to qualify themselves for regulation under the federal order so that their producers would be entitled to share in the regulated blend prices.

Elimination of the differential would have other adverse consequences for the market. Nearby farmers, deprived of the differential, could either be forced from business or some could become dealers themselves, enabling them to enjoy 100 percent fluid milk sales (R. 319, 386-87, 528, 560). Since the marketing order exempts producer-handlers from regulation, a reduction in fluid sales in the regulated market would occur. This would depress the blend price at the expense of all producers under the order. Nearby producers generally have rejected this option to become dealers in favor of participating in the market pool and receiving an adjustment in price to reflect the economic values which their milk production contributes to the market. Without this price adjustment of the nearby differential, the market as a whole would be the loser, and market stability would be seriously disrupted.

### III. IF IT IS DETERMINED THAT FOR ANY REASON THE NEARBY DIFFERENTIAL OF THE MASSACHUSETTS-RHODE ISLAND ORDER CANNOT BE SUSTAINED, REMAND IS REQUIRED.

#### A. This Case Was Not Ripe for Summary Judgment Below

Despite the Secretary's firm opposition to a peremptory determination below (R. 107, 112), the district court granted summary judgment and did so solely on the basis of the Court of Appeals' ruling in *Blair* (R. 120).[125] The case, however, was not appropriate

[125] While petitioners disagree with the rationale of the *Blair* opinion, *Blair* involved a totally discrete administrative record, far different and very limited findings by the Secretary not present in his decision regarding the Massachusetts-Rhode Island or predecessor orders, and other peculiar factors not present here. Under the New York-New Jersey order, for example, "all farms in the entire state of New Jersey were to be treated as if in the most favorable (1-50 mile) zone" for purposes of the nearby differ-

for such summary relief. The Secretary had denied by his answer filed in the district court material factual allegations in the complaint. These denials had placed in issue questions of fact and law, including the existence of customary trade practices both before and after passage of the 1935 amendments to the AAA and of the 1937 Act, whether or not the nearby differential adjustment in the marketing area resulted in an unfair and improper burden upon commerce, whether that adjustment was arbitrary or discriminatory in its practical application and where the equities lay as between the nearby and distant farmers in the distribution of funds being escrowed and in the need for a remand to the Secretary to correct the situation if any infirmity were found to exist in the Secretary's action. Coupled with these difficult questions were complex matters of statutory construction, legislative intent and administrative practice, as reflected in legislative and administrative materials not fully before the district court and extending over a 30-year period.

While in reviewing the legality of the Secretary's administrative action, certain of these questions could

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ential. 370 F.2d at 237. Moreover, in *Blair*, the Secretary in the marketing order and before the courts, relied solely on his authority under Sec. 8c(5)(B)(ii)(c) authorizing differentials on the basis of locations of delivery to support the nearby differential. While the nearby differential was determined by the First Circuit in *Green Valley* to qualify as both a location and a customary market differential, the Secretary in the various New England orders has largely premised his authority on the latter statutory source. It is at least noteworthy, however, that currently, in the Massachusetts-Rhode Island market at least, almost all milk is delivered from farmers to handlers at the farm from which it then is shipped by the handlers in bulk tank trucks to handler plants. Thus, the First Circuit's conclusion in 1939 that the same nearby differentials at issue here were location differentials is equally true today since the location of milk delivery is the farm.

have been tested by review of the Secretary's findings and of the record which underlay them, that process of review could not have been properly or adequately pursued by the district court. The administrative record itself was never fully presented to the court. As the court was advised by affidavit, it had before it only selected "excerpts" which were "not, however, complete, nor fully illustrative of all of the evidence before the Secretary" (R. 118). Certain of these hearing records and public documents were available in their entirety only in the Archives. In general, they were "very voluminous and cover[ed] over 30 years in their scope" (R. 117). Moreover, at the time of the district court proceedings, the Secretary was engaged in rule-making proceedings involving the marketing order in which a proposal to delete the differential had been advanced.[126] Because of the pendency of such proceedings, the Secretary had requested that the court defer any ruling until the matter had been considered before him, the distant farmers below had exhausted their administrative remedies and the Secretary had a full opportunity to consider the matter in a framework which would have

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[126] See pp. 23-24, *supra*. The failure of the distant farmers to raise before the Secretary the legal and factual questions now asserted, coupled with the denial of any participation by the nearby farmers as parties with the right to present evidence in the district court proceedings below has deprived the nearbys in practical effect of their right to a hearing statutorily prescribed. (§ 8c(4)). As this Court stated in connection with another statute administered by the Secretary of Agriculture requiring a full hearing:

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them" *Morgan* v. *United States*, 304 U.S. 1, 18 (1938).

enabled him to apply his expertise and the full range of his statutory powers (R. 107 and original record). The distant farmers opposed this request, and the court sustained them (R. 107).

Finally, by granting summary judgment, the district court acted without permitting the nearby farmers, who had received the differential for over 30 years and claimed the escrowed funds on the basis of their paramount equities, to participate as parties, either to present evidence or to advance their legal arguments despite their clear, acknowledged and unique interest in both the differential and in the escrow account.[127]

In a comparably complex case in which summary judgment was reversed and remanded, Justice Jackson, speaking for this Court, stated:

> "We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and

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[127] The nearby producers did not pursue their appeal on intervention since to have done so might have excluded them from participation on the merits before the District of Columbia Circuit. See pp. 26-27, *supra*. More vitally, it would have resulted in a distribution by the district court of all funds in the escrow account to the distant farmers since the Secretary's request to the district court to continue the escrow pending consideration of appeal had been rejected. Respondents, in acrimonious and intemperate correspondence, copies of which have been directed to the Clerk of this Court by them, have challenged the nearby farmers' right to refer to this denial of intervention. The nearby farmers, recognizing that their intervention appeal was vacated, do not contend here for reversal solely on the basis of the denial of their intervention but do submit that the denial was an egregious error which should be considered in the ultimate disposition of this case and in evaluating the propriety of summary judgment below.

simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.

"We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." (Footnote omitted.) *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, at 256-57 (1948).[128]

The complex nature of the legal and factual issues involved before the district court and its failure to air them, the inadequacy of the record containing only selected excerpts and the failure of the district court to permit a full and meaningful hearing to the nearby farmers whose stake in the proceeding was self-evident resulted in a "treacherous record" indeed. It led the court below to draw crucial but erroneous inferences which are belied by the facts. *E.g.* footnotes 78, 86, 114 and 117, *supra.* The court in *Cranston,* by permitting a full airing through trial in which all interested parties participated, developed a far more

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[128] In his treatise, Professor Moore has similarly observed:

"But by its nature summary judgment is apt to be ill-adapted to cases of a complex nature or to those that involve constitutional or other large public issues, which often need the full exploration of trial." 6 MOORE, FEDERAL PRACTICE 2284 (2d Ed. 1966).

solid basis for its findings in what the District of Columbia Circuit in *Blair* conceded is "an industry of labyrinthean [sic] complexity."

**B. If the Nearby Differential Is Not Sustainable on the Present Record, Settled Principles of Administrative Law Require Remand to the Secretary.**

If this Court determines that a deficiency exists in the Secretary's rationale for the nearby differential of the Massachusetts-Rhode Island order or in the form of that differential, then the decisions of this Court require remand to the Secretary and not the summary interdiction of the differential imposed by the courts below. *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947); *Addison* v. *Holly Hills Fruit Products*, 322 U.S. 607 (1944).

Even if the authority of the Secretary to provide for the nearby differential is in question, remand to the Secretary is the only appropriate disposition in view of the very unique and precise statutory and administrative scheme of government-producer partnership involved in this case. In determining upon the adoption of a milk marketing order, the Act requires the Secretary to find, after notice and hearing, that the order and "all of the terms and conditions thereof will tend to effectuate the [Act's] declared policy." Sec. 8c(4). Explicit approval by at least two-thirds of the affected farmers is equally essential before the order's effectuation. Sec. 8c(9). If the differential is simply stricken or terminated, as the lower court would have it, neither of these vital statutory safeguards would be met, and the order without the differential would be a nullity.

This Court has recognized that it is inappropriate to invade the expert province of an administrative

agency and indulge in speculation as to the agency's judgments where partial invalidity of an agency regulation is found to exist. In the *Addison* case, *supra,* where the lower court had struck a portion of an administrative officer's regulation but had not remanded to enable that officer to remold the situation, this Court reversed, stating:

> "We agree therefore with the Circuit Court of Appeals in holding invalid the limitations as to the number of employees within a defined area. But we cannot follow that Court in deleting this part of the administrative regulation and, by applying what remains of the definition, exempting Holly Hills' employees from the requirements of the Act. Since the provision as to the number of employees was not authorized, *the entire definition of which that limitation was a part must fall.* We can hardly assume that the Administrator would have defined 'area of production' merely by deleting the employee provision, had he known of its invalidity. *It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance.* It is not for us to write a definition. That is the Administrator's duty.
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> * * *
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> "It is our view that the case should be remanded to the district court with instructions to hold it *until the Administrator, by making a valid determination of the area with all deliberate speed, acts within the authority given him by Congress.*" (Emphasis added.) 322 U.S. at 618-19.

This Court then acknowledged that an element of retroactivity would be present, but that any solution,

including that of the lower court, would have a retroactive effect.

> "The accommodation that we are making assumes, what we must assume, that the Administrator will retrospectively act as conscientiously within the bounds of the power given him by Congress as he would have done initially had he limited himself to his authority. To be sure this will be a retrospective judgment, and law should avoid retroactively as much as possible. But other possible dispositions likewise involve retroactivity, with the added mischief of producing a result contrary to the statutory design.
>
> "Such an adaptation of court procedure to a remolding of the situation as nearly as may be to what it should have been initially is not unprecedented" at 620. See also *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17 (1952).

The situation here is a close parallel of that in *Addison.* The nearby differential provision is a key factor in the marketing order as its 30-year inclusion evidences. It not only is crucial to the nearby producers who have relied on it for far longer than a 30-year span but has been a fundamental and inextricably interwoven component of stable and orderly marketing in the Massachusetts-Rhode Island area. Before the district court, Mr. Herbert Forest, Director of the Dairy Division of the Department of Agriculture, attested to its importance. He stated that the differential's elimination "would bring about chaotic conditions in that market," and "so misalign the existing price structure, injure producers, and so seriously disturb long-standing marketing relationships

that permanent injury to milk supply for the consumers in the area would result" (R. 52). Without the differential, the Act's command that the Secretary's order "establish and maintain an orderly market" would be jeopardized. The Act's mandate for an equitable distribution among producers likewise would be irretrievably imperiled while a financial windfall would accrue to distant farmers who did not anticipate it in entering or in continuing to sell in the market. Finally, the farmers themselves would not have participated in their essential vote of approval even though over the years they have overwhelmingly voted in favor of the order with the differential included.

The court below, while acknowledging the viability of the *Addison* principle, nonetheless dismissed it here, relying in the main on a severability clause in the order (R. 212).[129] See 7 C.F.R. § 1001.96 (1968). As the lower court noted, the severability clause contemplates only that judicial invalidation "of some provisions would not upset the remainder" (R. 212), presumably recognizing that the invalidity of other key provisions would contaminate the entire order if closely interwoven with, and a material inducement for, the remaining provisions. The nearby differential provision is neither a secondary, minor provision of the order nor is it "discrete" from the overall pricing provisions

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[129] The lower court noted that the Secretary, unlike the nearby farmers, viewed the severability clause as of sufficient force to prevent vitiation of the order if the nearby differential provision were stricken (R. 212, n. 41). The Secretary's views here are at odds with those of the nearby farmers whose interests are much more directly tied to the Massachusetts-Rhode Island order alone and to their position and economic stake under it rather than to the sanctity of the Secretary's overall regulatory program.

of the order [130] and the Act's goal of an orderly and stable market. See pp. 65-68 herein. It is a key provision and one which goes to the heart of parity pricing and an equitable distribution of milk sales proceeds to all producers and particularly to the over 2,000 nearby farmers marketing under the order. The lower court went on to state that it found nothing to suggest that the differential's elimination would impair the Secretary's power and purpose in administering the regulatory scheme (R. 212). The Secretary, however, through his cognizant subordinates, had sharply indicated otherwise in affidavits and pleadings filed with the district court (R. 38, 43). It is the Secretary's intent in adopting the order and not the unsupported conclusions of the court below which should control as to the interdependence of the differential with other provisions of the order and the impairment of the Secretary's powers and purposes. *Cf. Carter* v. *Carter Coal Co.,* 298 U.S. 238, 313 (1936); *Allen* v. *City of Louisiana,* 103 U.S. 80, 84 (1881); *Fowler* v. *Gage,* 301 F.2d 775 (10th Cir. 1962).

As an additional premise for rejecting a remand to the Secretary in accordance with *Addison,*[131] the court

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[130] See, *e.g.,* the Secretary's decision regarding the 1964 order in which he stressed the intertwining of the various differentials by rejecting a reduction in the nearby differential since "an unwarranted decrease in returns to nearby producers would result" in light of his decision to reduce the zone differential by 7¢. 29 Fed. Reg. 11213-14 (1964).

[131] By footnote, the lower court also distinguished *Addison* on the grounds that the district court's injunction in this case would have no impact on rights arising from events occurring before the date of the court's judgment. This, however, is a bootstrap argument since the lower court then proceeded to modify the district court's judgment in order to conform. Moreover, the opinion of this Court in *Addison* suggests no such narrow interpretation be attached to its holding.

below speculated that the Secretary might not act responsibly, stating: "Since any discrimination attributable to farm location would appear to be invalid, there is no reason to afford him a chance to disburse them [differential payments] under a different name." (Footnote omitted). (R. 212-13). Such speculation not only is unfounded but also overlooks the other terms, "one or more" of which the Secretary could bring to bear under the Act in order to accord recognition to such inherent economic values of nearby milk production as evenness of production, accessibility, reliability and the like, as described at pp. 65-80 herein. Those powers include: a handler pool under sec. 8c(5)(B)(i) of the Act which would result in higher payments to farmers selling to handlers with high fluid use; a base-rating plan under sec. 8c(5)(B)(ii)(d) which would reward the more even producers, primarily those nearby the market, with higher prices; a redefining of the marketing area which could restrict the market limits and thus the affected handlers so as more nearly to coincide with earlier patterns under which nearby producers had received higher prices; application of other differentials, such as those for volume or production under sec. 8c(5)(B)(ii)(a), tailored to the increased values and costs of the production of nearby farmers; adjustment upward of existing differentials, particularly the zone differential, which could enhance the returns to nearby farmers; or elimination of federal regulation if the Secretary or the farmers who must sanction the order by vote concluded that, without the nearby differential, free market competition would be preferable.[132]

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[132] After years of federal regulation, Chicago farmers, by referendum vote in 1966, chose to revert to a free market in lieu of approving an amended order proposed by the Secretary. 31 Fed. Reg. 5368, 6195 (1966).

**IV. REGARDLESS OF THE OUTCOME OF THIS CASE, THE NEARBY FARMERS WHO HAVE RECEIVED AND RELIED UPON THE DIFFERENTIAL FOR OVER 30 YEARS EQUITABLY ARE ENTITLED TO THE FULL ESCROW FUNDS.**

The lower court modified the district court's order by determining that a significant but small portion of the escrow funds held in the court's custody should be distributed to the nearby farmers. The court, after alluding to certain of the equities militating against the distant farmers, stated:

> "In view of these factors, the nearby farmers could legitimately have expected to receive, and the distant farmers to pay, the differential until it has been held invalid, *after full opportunity for the presentation of views on both sides, by a court.* We think this is a fair view of the equities; and, since a preliminary injunction does not constitute a final judgment on the merits, appellant producers should receive the amounts escrowed between January 16 and June 15, 1967" (Emphasis added.) (R. 215).

While the court properly considered some of the equitable considerations that should govern the escrow distribution, it failed to give such factors adequate weight, and overlooked other pertinent and important equities.

First, no *full* opportunity for the presentation of views on *both* sides existed in the district court. The nearby farmers, who alone sustained a direct financial loss under the district court decree, were not heard or permitted to participate as parties before that court. They had no opportunity to present evidence, to participate in the creation of a record, or to present arguments founded on such a record in support of their cause.

Second, the court below failed to give appropriate consideration to the magnitude of the investments made by nearby farmers in reliance upon the differential for over 30 years and to the economic impact upon their operations if the differential is invalidated. Millions of dollars have been invested in facilities useful only in dairying. Without the differential or a comparable adjustment to compensate the nearby farmers for the added economic values they contribute to the market, they may well be forced from business or be compelled to serve as producer-dealers. In either event, severe instability will result in the Massachusetts-Rhode Island and neighboring markets.[133] The distant farmers, on the other hand, have not presented any substantial evidence before the Secretary in opposition to the nearby differential. Instead, they have enjoyed the benefits of blended uniform prices established under orders which consistently included the differential. Many have shifted their sales from other markets because of higher prices prevailing in the Massachusetts-Rhode Island milk marketing area (R. 41, 615, 625, 330). Distant farmers have not made their business decision, built their herds or developed their farms in contemplation of the economic windfall they

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[133] See pp. 74-80 herein. The lower court took note of these factors as they were developed in the 1964 hearings and in the Secretary's 1964 and 1967 decisions (R. 213, n. 45). It went on to cast them aside on the grounds that the sole remedy was for Congress to enlarge the Secretary's powers. This, however, is not the case. A remand to the Secretary would assure ample consideration of these complex economic matters and of their relevance to the distribution of the escrow funds, for the Secretary does indeed possess a "peculiarly informed" expertise (R. 213, n. 43), which should be brought to bear in the equitable distribution of those funds.

will receive if the nearby differential is ruled invalid by this Court.

Third, and perhaps most vital, the court below failed to accord recognition to the fact that the Secretary, acting clearly within his statutory authority, could have compensated nearby producers in at least some measure for the economic values of their nearby milk production and might well have done so, if from the outset he had been aware that the nearby differential was invalid.

In *United States* v. *Morgan,* 307 U.S. 183 (1939), this Court, confronted with a similar situation, instructed the lower court, in distributing funds from an escrow account maintained as the result of the invalidity of administrative agency proceedings, to be guided by equitable principles which could take into account a subsequent determination by the agency:

> "A proceeding is now pending before the Secretary in which, as we have seen, he is free to determine the reasonableness of the rates. His determination, if supported by evidence and made in a proceeding conducted in conformity with the statute and due process, will afford the appropriate basis for action in the district court in making distribution of the fund in its custody." At p. 198.

The possible application of this same principle to escrow funds involved in the complex regulation of milk marketing has specifically been noted by this Court. In *Lehigh Valley Cooperative Farmers, Inc.* v. *United States,* 370 U.S. 76 (1962), this Court, in holding the compensatory payment provision of the milk order there invalid, stated:

> "The Secretary of course remains free to protect, in any manner consistent with the provisions of the

> statute, the 'blend price' in this or any other marketing area against economic consequences resulting from the introduction of outside milk. We do not now decide whether or not any new regulation directed to that end could be made to apply retrospectively, or whether, if it could be validly so applied, the presently impounded funds could be resorted to pro tanto in its effectuation." At p. 99.

With his assortment of regulatory tools, the Secretary, as noted at p. 90 herein, may be able to reflect the inherent economic values of nearby milk production through "one or more" other authorized regulatory terms. Under such circumstances, he should be afforded the opportunity to do so and to resort to the escrow funds *pro tanto* in order to make full distribution to the nearby farmers rather than to those who have contributed no special economic values to the market and who for 30 years remained silent, and indeed, voted in, by virtue of their controlling numbers, milk marketing orders which have consistently included the nearby differential adjustment.

## CONCLUSION

For the reasons stated, it is respectfully submitted that:

(1) The judgment of the court below should be reversed, the injunction vacated and the escrow fund distributed in full to the nearby farmers;

(2) If this Court should determine that for any reason the nearby differential provision of the order cannot be sustained on the basis of the record before it, the judgment of the court below should be reversed.

the injunction vacated and the case remanded with directions (a) that the Secretary of Agriculture consider the matter further in accordance with guidelines laid down by this Court or (b) that the district court provide a trial on the merits. In either event, the escrow fund and future nearby differential adjustments should be paid in full to the nearby farmers pending further determination by the Secretary or by the district court; or

(3) At a minimum, in the event of an affirmance by this Court, the escrow fund as of the date of this Court's judgment should be paid in full to the nearby farmers or disposed of in accordance with appropriate findings of the Secretary of Agriculture.

Respectfully submitted,

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